48300

EDWARD MIDURA,	)	
Plaintiff-Appellee,	)	APPEAL FROM THE
vs.	)	CIRCUIT COURT OF
PAUL THIENPONT, RAYMOND J. THIENPONT, and S.C. VILLANO,	)	COOK COUNTY
Defendants-Appellants.	)	

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This is a suit for specific performance of a contract for the sale of real estate at 1714 N. Spaulding, Chicago. The property is owned by the defendants, Paul Thienpont, and his son, Raymond, as joint tenants, however, the contract for the sale of the property was not signed by Raymond Thienpont. Plaintiff moved for the entry of a Summary Decree for specific performance of the defendant Paul Thienpont's undivided one-half interest, and the case was tried on the affidavits and counteraffidavits of the parties. The court ordered the defendant Paul Thienpont to specifically perform the contract on his part to the extent of his one-half interest in said property with a corresponding abatement of the purchase price, and the plaintiff was ordered to pay the defendant the purchase price as adjusted. Defendant appeals on the theory that the case involved material issues of fact which could not be disposed of by a summary decree. In the alternative, he states that if the plaintiff would make a tender of $14,000, the agreed purchase price for the entire interest, the defendant would deliver his deed, as set forth in the contract, without any modification of court by decree or otherwise.

The issues then involve the propriety of the decree ordering the specific performance of the contract for the sale of the realty. However, in our view of the matter, we have reluctantly concluded that we do not have jurisdiction to decide this controversy as the case involves a freehold.

Section 75 of the Civil Practice Act (Ch. 110, sec. 75 (1) (a)) provides that "(1) Appeals shall be taken directly to the Supreme Court (a) in all cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved, ...". The test as to whether a freehold is involved is whether "it is required that a necessary result of the decision must be the loss by one party and a gain for the other of a freehold, or the title must be so put in issue by the pleadings that the determination of the case necessarily requires a decision with respect to the ownership of the real estate in controversy." Brown v. City of Evanston, 2 Ill. 2d 504, 510. "This action involves a demand for specific performance and an action for specific performance of a contract to convey real estate involves a freehold." Rose v. Dolejs, 1 Ill. 2d 280, 283. Brubaker v. Hatjimanous, 404 Ill. 342, 343; Schiro v. W.E. Gould & Co., 18 Ill. 2d 538, 542; Burke v. Burke, 12 Ill. 2d 483, 484; Laegeler v. Bartlett, 10 Ill. 2d 478, 480; McCarthy v. McCarthy, 6 Ill. 2d 42, 57. The Appellate court has no jurisdiction of an appeal to review a decree for specific performance where a freehold is involved. Schmidt v. Barr, 328 Ill. 365.

Cause is transferred to the Supreme Court of Illinois.

FRIEND, P.J. ,and
BURKE, J. Concur.

A

48349

EVELYN S. JONES, Appellee,	)	APPEAL FROM SUPERIOR COURT,
vs.	)	COOK COUNTY.
J. EDWARD JONES, Appellant.	)	

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On March 11, 1958 a decree was entered in the Superior Court denying a divorce to Evelyn S. and J. Edward Jones. In that suit J. Edward Jones, the defendant, had filed a countercomplaint seeking divorce, and following the decree, he appealed to the Supreme Court of Illinois; plaintiff filed a cross-appeal. On September 24, 1958 plaintiff's attorneys, pursuant to notice, and while the appeal was pending in the Supreme Court, presented her petition for the allowance of attorneys' fees to defend. Defendant answered the petition, setting forth various factual, as well as legal, defenses. The chancellor heard oral arguments as to the legal defenses and on October 21, 1958 entered an order overruling them. Thereafter testimony was taken as to the controverted questions of fact set forth in defendant's answer, briefs were submitted, and the matter was taken under advisement. On March 17, 1959 an order was entered directing defendant to pay $1500.00 to plaintiff as attorneys' fees. Defendant then filed a petition to vacate the order, and plaintiff had leave to answer within six days. The motion to vacate was set for hearing April 3, 1959. In the interim defendant had leave to amend his petition to vacate the order for fees, and after

numerous continuances and intervening orders to correct the record, the following order was entered on April 24, 1959: "On motion of J. Edward Jones, due notice having been served and the Court having heard arguments of counsel and being fully advised in the premises, It is ordered that defendant J. Edward Jones' petition to vacate the order of fees and the amendments thereto of 3-17-59 be and hereby are denied." No appeal was taken from either the order of March 17, 1959 providing for the allowance of fees or the order of April 24, 1959 denying defendant's motion to vacate the March 17th order.

Subsequently, on June 24, 1959, plaintiff filed a petition for a rule to show cause why defendant should not be held in contempt for failure to comply with the order of March 17, 1959 to pay fees. The report of proceedings shows that defendant testified as to his equities in certain properties worth at least $50,000.00, and at the conclusion of the hearing defendant, on December 2, 1959, was held in contempt and ordered committed to the County Jail for a period not to exceed six months, "unless he shall sooner purge himself of his said contempt . . . by paying to the petitioner [as fees for her attorneys], Friedman, Friedman & Armstrong, or to the Sheriff of Cook County, Illinois, for her use the sum of fifteen hundred Dollars, or unless he shall sooner be discharged by due process of law . . . ." Commitment was stayed to December 7, 1959, when the chancellor supplemented his order of December 2nd by denying defendant's contention that subsection (4) of section 72 of the Civil Practice Act is unconstitutional, and likewise denying his contention "that the orders of March 17th, 1959 and

April 24th, 1959, are unconstitutional . . . ." On December 7, 1959 defendant appealed directly to the Supreme Court "from the orders of December 2, 1959, as amended, which finds [sic] him to be in contempt and orders mittimus to issue and denies his contentions that section 72 Ill. Civil Practice Act, subsection 4 and the orders of March 17th, 1959 and April 24th, 1959, are unconstitutional, etc." The Supreme Court transferred the case to the Appellate Court without opinion.

Defendant seeks to explain his failure to appeal from either of the orders of March 17, 1959 or April 24, 1959 on the theory that under section 72 of the Civil Practice Act (Ill. Rev. Stat. 1959, ch. 110) he was entitled to a review of these orders, contending that errors appeared on the record which could be corrected under that section of the statute by petition. However, that section does not contemplate review of orders from which a party could have appealed within the time fixed by section 76 of the Civil Practice Act. The orders of March 17, 1959 and April 24, 1959 were final and appealable. Defendant fails to show a sufficient basis for nonappellate review of the final and matured orders; he cannot invoke the provisions of section 72 as a substitute for his right to appeal. Other points raised by him need not be considered. Accordingly, the contempt and commitment order of the Superior Court of December 2, 1959 and the supplemental order of December 7, 1959 are affirmed.

Orders affirmed.

BRYANT, J., and
BURKE, J. Concur.

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48374

Herbert Betts, Robert Mann, Donald Ehlers and William Savage, Plaintiffs-Appellees,	)	
vs.	)	
Village of Calumet Park, a Municipal Corporation; John Swalec, President of the Village of Calumet Park; John H. Coon, Village Clerk of the Village of Calumet Park; Tony (Anthony) Pizza; Max Freeman, Raymond Alford and Pauline Hagen, Defendants-Appellants.	)	Appeal from Superior Court Cook County

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This is an action for declaratory judgment to determine the powers vested in the village board of trustees with respect to appointment of officers and organization of committees, under Ch. 24, sec. 9-84, Ill. Rev. Stat., prior to the amendment, effective July 15, 1959. The complaint, filed in June, 1959, sought a declaration that certain village officers were properly appointed by the board of trustees and that other officers purportedly appointed by the village president improperly held office. On Jan. 8, 1960, the trial judge entered judgment on the pleadings, decreeing that under the former law, the appointments of the plaintiffs were valid and the former appointees no longer held office.

Defendants appealed directly to the Supreme Court on the theory that the former statute violated the doctrine of the separation of powers under the constitution. The Supreme Court held that no debatable constitutional issue was involved and transferred the cause to this court. Betts v. The Village

of Calumet Park, 20 Ill. 2d 524. No briefs have been filed by appellees.

Former section 9-84 of the Revised Cities and Villages Act (Ch. 24, sec. 9-84, Ill. Rev. Stat.) provided that "The president and board of trustees, voting jointly, may appoint (1) a treasurer; (2) one or more street commissioners; (3) a village marshal; and (4) such other officers as may be necessary to carry into effect the powers conferred upon villages."

In April 1959, the four plaintiffs were elected as trustees of the Village of Calumet Park. The board of trustees consists of the president and six trustees. On April 25, 1959, the village president, after previously notifying the plaintiffs of a meeting to discuss future appointments, made a number of emergency appointments of certain village officers for 30 days. On May 8, 1959, the president and the six trustees met and one of the newly elected trustees proposed committees, each of which would be headed by one of the four plaintiffs, and none of which would be headed by the other two trustees. Thereafter, plaintiffs proposed that all village officers be removed from office and that certain others be appointed to office. Committees and office appointments were passed by a vote of four to three, with the president casting his vote with the two trustees voting against the proposal.

On May 22, 1959, a meeting was held attended by the president and all six trustees, at which meeting the president read veto documents of the committee appointments as well as the office appointments. The plaintiffs then moved to override

the veto and the vote thereon was four trustees voting for and two trustees voting against. The president also voted with the two trustees against the plaintiffs, however, the plaintiffs moved to strike the president's vote on the grounds that the statute does not give the president the authority to vote on a motion to overrule his veto. This motion to strike was also passed by a four to three vote.

Thereafter, the persons whom plaintiffs attempted to appoint as village officers appeared for swearing in, tendered their oaths of office and their official bonds. The village clerk refused to swear them in and would not accept their oaths or bonds.

On June 1, 1959, plaintiffs filed their suit for declaratory judgment. On July 15, 1959, section 9-84 of the act in question was changed to provide that "The president, by and with the advice and consent of the board of trustees, may appoint" the designated officers.

The defendants, in their answer and supplemental answer, urged, among other grounds, that the amendment of the act clearly gave the president appointive powers. On January 8, 1960, the trial court entered judgment on the pleadings and found that the action of the trustees on May 8, 1959, was valid with respect to the appointments of a police marshal, fire marshal, collector and treasurer and that the defendant officials who held such positions "no longer held" such offices.

The defendants have advanced numerous grounds for reversal. They contend that the action of the plaintiffs in

attempting to override the veto was invalid; that plaintiffs were not empowered to appoint a police or fire marshal; that relief should have been sought in a "quo warranto" proceeding; that the declaratory judgment was not properly maintained. The main ground urged for reversal is that the case is moot.

Plaintiffs seek a declaratory judgment which would declare the rights of the president and the trustees with respect to the appointments of village officials under prior law. In our view of the matter, such a determination cannot be rendered as a decision of this nature would not determine or establish any rights.

It is fundamental that where the legislature has changed the law, the case must be disposed of under the law as it presently exists, and not as it formerly existed. Illinois Chiropractic Society v. Giello, 18 Ill. 2d 306, 310; Abbate Bros. Inc. v. City of Chicago, 11 Ill. 2d 337, 341-2; Hughes v. Illinois Public Aid Com., 2 Ill. 2d 374, 378; Fallon v. Commerce Com., 402 Ill. 516, 526; The People ex rel. Toman v. Mercil & Sons Co., 378 Ill. 142, 162-3; Ward v. Village of Elmwood Park, 8 Ill. App. 2d 37, 39. This court will not review a case merely to decide moot or abstract questions, to establish a precedent, or to render a judgment to guide potential future litigation. La Salle Nat. Bank v. City of Chicago, 3 Ill. 2d 375, 378-9; City Bank & Trust Co. v. Bd. of Educ. 386 Ill. 508, 519-20; Collins v. Barry, 11 Ill. App. 2d 119, 124. Finally, if a case is moot the judgment of the trial court must be reversed and the cause

remanded with instructions to dismiss the complaint. Maywood Trotting Ass'n. v. Racing Com., 15 Ill. 2d 559, 563-4; La Salle Nat. Bank v. City of Chicago, 3 Ill. 2d 375, 382.

Accordingly, the judgment is reversed and the cause remanded with instructions to dismiss the complaint.

JUDGMENT REVERSED AND
CAUSE REMANDED WITH
DIRECTIONS.

FRIEND, P.J., and BURKE, J., Concur

48413

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Defendant in Error,	)	WRIT OF ERROR TO
	)	
vs.	)	MUNICIPAL COURT
	)	
LINDSEY M. JAMES,	)	OF CHICAGO
	)	
Plaintiff in Error.	)	

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

An information charged that on April 13, 1960, Lindsey M. James at Chicago unlawfully, wilfully and fraudulently obtained from the "Chicago Board of Education-William C. Reich, complainant and member of Board of Examiner $1,750.00 in U.S. Currency by means of false statements and documents, and the said complainant relying and believing said statements and documents to be true and correct, and being deceived thereby, which FALSE PRETENSES, were then and there made by the defendant with the intent to defraud the Chicago Board of Education, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois." On December 21, 1960, the defendant, without counsel, pleaded guilty. Judgment was entered on the plea and he was sentenced to serve a term of one year at the Illinois State Farm at Vandalia, where he is presently confined. The defendant contends that the information fails to allege the commission of an offense. Our State Constitution says that in all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation against him. The purpose of this guaranty is to secure to the accused such specific designation of the offense charged

against him as will enable him to fully prepare his defense and to plead the judgment involved in a subsequent prosecution for the same offense. People v. Barnes, 314 Ill. 140; People v. Covitz, 262 Ill. 514; People v. Clark, 256 Ill. 14. The Criminal Code states that every indictment shall be deemed sufficiently technical and correct which states the offense in the terms and language of the statute creating the offense, or so plainly that the nature of the offense may be easily understood by the jury, and that every information shall set forth the offense with reasonable certainty, substantially as required in an indictment. As a general rule it is sufficient in an indictment or information to state the offense in the language of the statute in those cases where the statute clearly defines the offense. However, where the statute does not define or describe the act or acts constituting the offense created, such acts must be specifically alleged. People v. Peters, 10 Ill. 2d 577; People v. Potter, 5 Ill. 2d 365; People v. Chiafreddo, 381 Ill. 214; People v. Green, 368 Ill. 242; People v. Brown, 336 Ill. 257.

The information makes no attempt to allege the false statement or misrepresentation made by the defendant in order to obtain the money; nor does it set out any of the "documents." The information does not give the defendant sufficient information to prepare a defense. It is not sufficiently detailed so that the defendant might plead his conviction or acquittal as a bar to the subsequent prosecution for the same offense. It cannot be ascertained from the information whether the defendant is alleged to have obtained the money from the

Board of Education or from William C. Reich, and there is no allegation that either owned the money obtained. The full opinion in People v. Kaung, 286 Ill. App. 615, (abst.) held a similar information to be fatally defective. See also People v. Dolan, 21 Ill. App. 2d, 312, (abst.); People v. Crosson, 30 Ill. App. 2d 57. The information fails to state an offense.

Therefore the judgment is reversed.

JUDGMENT REVERSED.

FRIEND, P.J. and
BRYANT, J., Concur.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10347 Agenda No. 17

Archer-Daniels-Midland Company, a corporation, Plaintiff-Appellant, vs. Norman E. Hulcher, Defendant--Appellee.	Appeal from the Circuit Court of Macoupin County

CARROLL, Justice

This is an action for damages alleged to have been occasioned by the fraud of defendant in submitting a false financial statement to plaintiff.

At the time the alleged fraud was perpetrated, defendant was the president and principal stockholder of Hulcher Soya Products, Inc., which will be referred to herein as the corporation. For many years prior to 1955 the corporation was engaged in buying and selling soybeans and other grains. It had also operated a grain elevator and a soybean processing plant. In the fall of 1954 it abandoned its processing operation. In 1955 it was engaged in dealing in futures on the soybean oil market. In such business it bought and sold soybean oil in car load lots. These transactions were generally handled through a broker. The standard

form of contract between buyer and seller was used. The terms of payment were cash on delivery. Plaintiff was one of numerous concerns with which the corporation was doing business.

The complaint is in 2 counts. In substance it is alleged in the first count that for a number of years prior to December, 1955, plaintiff had been selling soybean oil and other soybean derivatives to Hulcher Soya Products, Inc., a corporation; that in such transactions plaintiff had extended extensive credit to said corporation; that from time to time plaintiff requested and was furnished by the corporation, financial statements showing its assets; that plaintiff relied upon such statements in extending credit to said corporation; that in the month of November, 1955, Plaintiff requested a financial statement from the corporation; that on December 10, 1955, in response to said request, plaintiff received from the corporation, a financial statement as to its condition as of December 1, 1955; that said statement was prepared and signed by the defendant, Norman L. Hulcher; that said statement was false and fraudulent in many respects; that plaintiff believing said statement to be true and relying thereon, extended further and continuing credit to the corporation in large amounts; that defendant knew said financial statement was false and untrue; that on or about August 15, 1956, the corporation became insolvent and unable to pay its indebtedness to plaintiff; that subsequently an involuntary bankruptcy proceeding was filed against the corporation; that as a

result of the false and fraudulent representations contained in the financial statement of December 1, 1955, plaintiff has been damaged in a substantial amount.

Count 2 of the complaint charged defendant with fraud in failing to notify plaintiff subsequent to its receipt of the financial statements of December 10, 1955, of a change in the financial condition of the Hulcher Soya Products, Inc.; that as a result of defendant's failure to so notify plaintiff, the latter continued to extend credit to the Hulcher company and, thereby sustained damages and loss.

The cause was tried by the Court which found proof of fraud lacking and insufficient and entered judgment for the defendant.

It is contended on this appeal that the defendant was guilty of fraud and deceit as a matter of law and that the finding of the trial court was against the manifest weight of the evidence.

The record shows that during 1954 and 1955 the corporation in the regular course of its business was buying soybean oil; that these purchases were in car load lots for future delivery; that they were handled through agreements called, "future delivery contracts"; that the terms of payment specified in such agreements were, "Net cash. Carloads: Sight draft order bill of Lading attached. L.D.L. Shipments: Net cash 10 days from date of invoice. Oil shipped on open terms subject to sight draft if not paid in

10 days from date of invoice."; that the oil was shipped with a sight draft bill of lading attached; that when the sight draft was honored, the particular carload of oil covered by such draft passed to the corporation; that the corporation did not in all cases take actual delivery of the oil but re-sold and shipped the same to another purchaser employing the same kind of draft procedure as used by plaintiff; that both plaintiff and the corporation were dealing in the same market, which was to some extent speculative; that in 1954 plaintiff requested and received from the corporation a financial statement of its condition as of August 31, 1954; that this statement was prepared by Certified Public Accountants and was a copy of the annual audit statement of the corporation; that under date of December 6, 1955, plaintiff wrote the defendant corporation a letter, which insofar as is pertinent here, is as follows:

> "Periodically we review our credit lines and in that connection your account comes up for review. We are glad to note the substantial purchases from us and we thank you for this business.
>
> "In reviewing our file we note that the last statement furnished us was as of November 1, 1954. In order that we may bring our credit files up to date, would you send us a copy of your latest financial statement on the enclosed form, or in whatever way you prefer."

According to the defendant's testimony, on December 10, 1955, he received a phone call from Wilbur F. Anderson, general credit manager for plaintiff, in which Anderson inquired whether defendant had sent the financial statement requested; that defendant thereupon replied that he had not filled out the statement form

because not being an auditor or bookkeeper, he did not feel qualified to do so; that Anderson then asked defendant if he was not acquainted sufficiently with the general condition of the corporation to give plaintiff a general picture thereof; that thereupon defendant asked Anderson to wait until the corporation's audited statement was received as he preferred to send a copy of such statement; that Anderson told defendant to go ahead and fill out the form which had been sent to the corporation; that defendant knew Anderson prior to the occasion of the phone conversation and recognized his voice; and that defendant then proceeded to fill out the form as directed by Anderson. It further appears from the evidence that the form furnished by plaintiff was one published by the National Association of Credit Men; that this form called for a complete statement of the financial condition of the corporation which required breaking down assets and liabilities to show in detail the figures comprising the same; that defendant had a very limited knowledge of bookkeeping and auditing and was unable to answer many of the questions that appeared on the form; that relying upon his general knowledge of the business and figures furnished him by the corporation bookkeeper, he listed the assets and liabilities of the corporation in round figures without any attempt at a break down thereof; that defendant did not answer many of the questions listed on the form; that the figures representing inventory and physical plant were estimates, which defendant regarded as being conservative; and that during the period

between August and December of 1955 the corporation had done a profitable business. Defendant further testified that on the bottom of the form he typed the following, which appears thereon: "Our statement is due from the auditors in the near future, if you require a copy, please advise. neh."; and that such auditor's statement was received by the corporation on December 28, 1955.

Anderson testified for the plaintiff and denied having the phone conversation with the defendant on December 10, 1955, concerning which the defendant testified. Anderson further testified that he had no conversation with anyone connected with the corporation during the month of December, 1955.

The record further shows that there was a continuous rise in the soybean oil market from February to the middle of May, 1956, when it began to decline; that this decline persisted until mid-September, 1956, and then again began to rise; that about July 20, 1956, the corporation's cash position became short and it was unable to accept drafts and take delivery; that thereupon a meeting of the creditors of the corporation was called and an attempt made to work out a program for the solution of its financial difficulties; that no agreement was reached at said meeting; that an involuntary petition in bankruptcy was filed against the corporation and subsequently its assets were liquidated and distributed under Chap. 11 of the Bankruptcy Act. Plaintiff, as a creditor received a pro rata dividend under such distribution and this action involves

the balance of its claim against the corporation plus interest and expenses incurred in the bankruptcy proceedings.

The evidence relied upon by plaintiff as sufficient to make out its case of fraud, consists principally of a re-constructed financial statement prepared just prior to the trial by plaintiff's accountants from the books of the corporation purporting to show its financial condition as of December 1, 1955. It appears to be undisputed that the figures shown on plaintiff's re-constructed statement do not agree with those appearing on the form prepared by defendant on December 10, 1955. Accordingly there appears to be no necessity for detailing the figures shown in the two statements.

The record further shows that a 6 months audit of the corporation books as of February 28, 1955, and the yearly audit of August 31, 1955, were both furnished to the plaintiff and the same are in evidence. The audit of February, 1956, to which plaintiff referred in the December, 1955, statement also appears in evidence. The latter shows a net worth only slightly less than that indicated by the previous audit and that the corporation made a profit during the period covered. However, it provided for a reserve for loss on outstanding future purchases and sale contracts based upon the market price of the commodities as of the date of the audit. The inclusion of such reserve would have resulted in showing a net loss.

There is also evidence in the record showing that because of the fluctuating markets on which plaintiff was dealing it was

not possible for the books of the corporation to reflect an accurate statement of its financial position from day to day. A witness for the defendant also testified that plaintiff's reconstructed statement did not reflect the true financial condition of the corporation as to net worth or proper allocation of assets and liabilities.

The law pertaining to actions for fraud and deceit in Illinois is well established. Essential to recovery in such an action is proof that a representation was made as a statement of an existing fact, which was untrue and known to be untrue by the party making it or recklessly made; that it was made with intention to deceive and for the purpose of inducing the other party to act upon it; and that such other party did in fact rely on it and was induced thereby to act to his injury or damage. Accordingly, failure of proof of knowledge of the falsity of the statement (scienter) and intent to deceive is fatal to a plaintiff's action for deceit. Tone v. Halsey, Stuart & Co., 286, Ill. App. 169. Lickus v. O'Donnell, 321 Ill. App. 144. In the latter case the necessity of proof of intent to deceive is emphasized by the Court in this language:

> "Fraud and deceit usually embody some design or motive to deceive a person to his injury. It therefore generally originates through some plan or scheme to practice deception, and the common purpose of such acts and dealings is to obtain a profit or advantage to another's injury, although benefit to the guilty part is immaterial as the gravamen of the action is injury to the plaintiff and not benefit to the

not possible for the books of the corporation to reflect an accurate statement of the financial position from day to day. [illegible] witness for the defendant also testified that plaintiff's reconstructed statement did not reflect the true financial condition of the corporation as to such as to permit proper allocation of assets and liabilities.

The law pertaining to [illegible] for issue and consideration in Illinois is well established. Necessary to recovery in such an action is proof that a representation was made [illegible] of an existing fact, which was material [illegible] and reasonably relied upon by the plaintiff; that it was made with intent to deceive and for the purpose of inducing the plaintiff to act upon it; and that he did so to his injury. [illegible] absolutely to use to his injury is actionable. Certainly, failure of proof of knowledge of the falsity of a [illegible] representation is evidence of intent to deceive is fatal to a recovery; action for damages. Hunn v. Kuhner, Hunnt & Co., 205 Ill. App. 1[illegible]. In the [illegible] case the necessity of proof of intent to deceive is emphasized by the court in the language:

> "Fraud and deceit usually embody some intention or motive to deceive a person to his injury. [illegible] therefore generally exist in some thought [illegible] plan or scheme to practice deception, and the [illegible] purpose of such scheme and [illegible] is to obtain a profit or [illegible] to another's injury, although [illegible] the injury may be immaterial or [illegible] injury to the [illegible] for benefit [illegible]

> wrongdoer. The very nature of the term 'fraud and deceit' contemplates a state of mind affirmatively operative with a secret and furtive design, based upon a motive of self-interest, ill will or some other ulterior purpose. The rule is firmly established that the existence of a fraudulent intent or an intent to deceive, is an indispensable element to the sucessful maintenance of an action for fraud and deceit."

The presumption is that all men are honest. Where fraud is charged it must be proved by clear and convincing evidence. Weininger v. Metropolitain Fire Ins. Co., 359 Ill. 584. Bernstein vs. Bernstein, 398 Ill. 52.

According to his testimony, the defendant before preparing the financial statement on which the complaint is based, told Anderson, the credit manager, that since defendant was not an auditor he did not feel qualified to fill out the form; that he preferred to send a copy of the corporation's annual audit and that despite this explaination defendant was told in effect to go ahead and prepare the statement from his knowledge of the general condition of the corporation. If defendant had intended to falsely misrepresent the financial condition of the corporation, it would be rather difficult to believe that in advance of so doing, he would have expressed doubt as to his ability to furnish the figures called for on plaintiff's form. If defendant was bent on practicing a fraud upon plaintiff, it would seem more reasonable for him to conceal any fact reflecting upon the accuracy of the statement he was about to prepare. Likewise the willingness of defendant to furnish a copy of the annual audit, which was due in the near future seems

> wrongdoer. The very nature of the term 'fraud' and 'deceit' contemplates a wilful [illegible] clearly only operative with a corrupt and fraudulent design, based upon a motive of self-interest, ill will or some other ulterior purpose. The rule is firmly established that the existence of a fraudulent design or intent, [illegible], is an indispensable element to the [illegible] maintenance of an action for fraud or deceit."

The presumption is that all men are honest. [illegible] it must be proved by clear and convincing evidence. [illegible] Metropolitan [illegible] 198 Ill. 52.

According to the testimony, the [illegible] pany the financial statement [illegible] Indeed, the [illegible] he did not feel [illegible] to send a copy of the appraiser's report [illegible] this conversation [illegible] prepare the statement from his notes [illegible] of the appraisal. [illegible] represent the financial condition of the company, it would be rather difficult to believe that [illegible] have expressed [illegible] ability [illegible] called for as violative [illegible]. [illegible] a fraud upon plaintiff. [illegible] conceal any fact [illegible] was about to [illegible] a copy of the appraisal [illegible]

to mitigate strongly against the conclusion that he harbored an intent to deceive plaintiff. If defendant knew the statement was false, a willingness to expose his perfidy would appear inconsistent with an intent to deceive.

The evidence shows that the statement prepared by defendant did not list the amount of the corporation deposits on margin trading accounts with brokers. Plaintiff points to this omission as proof of fraudulent intent on the part of defendant. While the plaintiff's reconstructed balance sheet prepared by them for the trial contained such an item, no such heading appeared on the form which plaintiff furnished to defendant. Furthermore, it appears that plaintiff was fully aware that the corporation was engaged in margin trading. Its prior audit furnished to plaintiff fully disclosed the corporation's activities in that field. We cannot agree with plaintiff's contentions that omission of the margin trading item constituted willful concealment of an existing material fact. The same may be said of plaintiff's argument that failure of the statement to specifically list an item of a $70,000 advance to defendant by the corporation. Examination of defendant's statement indicates he made no attempt to be specific as to either assets or liabilities but apparently was attempting, as he testified, to give plaintiff a general picture of the condition of the corporation.

That such was defendant's intention appears to find corroboration in plaintiff's letter of December 6, 1955 requesting

the corporation to send a copy of its "latest financial statement on the enclosed form" and the evidence that a copy of the corporation's latest, 1955, audit was not then available.

Another factor bearing on the issue of scienter is the type of business carried on between plaintiff and the corporation at the time the statement in question was furnished. Both were trading in soybean oil. Plaintiff was one of a number of concerns with which the corporation was dealing. It is clear from the evidence that the corporation's transactions with plaintiff and other dealers were on a cash on delivery basis. Such had been the course of dealing between plaintiff and the corporation for many years and there is no evidence indicating that either party contemplated any change in its method of doing business. In such situation there would appear to be no reason for defendant to consider the financial statement as an application for credit. Absent the motive of obtaining an extension of credit for the corporation, the element of intent to deceive is lacking.

From our examination of the evidence in this record, we are of the opinion that as to scienter and intent to deceive it falls short of constituting that clear and convincing proof which is essential to sustain the charge of fraud. In view of such conclusion it appears unnecessary to consider the evidence as it pertains to the materiality of the representations and the issue of plaintiff's reliance thereon.

Plaintiff contends that the trial court erred in permitting defendant to testify as to his conversation of December 12, 1955, with plaintiff's credit manager and invokes the parol evidence rule in support of its position. This rule is applicable to agreements which have been reduced to writing and by it the parties thereto are precluded from explaining, adding to or varying the terms of such agreements. Here there was no contract between the defendant, Norman E. Hulcher, and the plaintiff. The rule is not applicable as they were not parties to a written agreement.

Whether the financial statement in question was false, whether defendant knew it was false and whether it was intended to thereby deceive and injure plaintiff were questions of fact for the trial court. There was a sharp conflict in the testimony of certain witnesses and particularly with reference to the conversation between Anderson and the defendant and to which the latter testified. In non-jury cases, it is the rule that the findings and judgment of the trial court will not be distrubed by the reviewing court if there is any evidence in the record to support such findings. Only where the trial court's findings are manifestly against the weight of the evidence will a reviewing court undertake to substitute its judgment as to the credibility of witnesses for that of the trial court. Brown v. Zimmerman, 18 Ill. 2d 94, Such is not the situation in the instant case.

The judgment of the Circuit Court of Macoupin County is affirmed.

AFFIRMED

ROETH, P. J., and REYNOLDS, J., concur.

Plaintiff contends that the trial court erred in [illegible] defendant be tested as to his [illegible] with plaintiff's credit manager [illegible] in support of its position. [illegible] which have been reduced to writing [illegible] are precisely [illegible] such agreements. Here there was no [illegible] Norman E. Dalton, and the plaintiff. [illegible] as they were not parties to a written [illegible].

Whether the [illegible] whether [illegible] thereby [illegible] trial court. [illegible] between [illegible] In non-jury cases, it is the [illegible] the trial court will not [illegible] to any [illegible] the trial court's [illegible] evidence will a reviewing court [illegible] as to the credibility [illegible] Brown v. Kimerson, [illegible] the instant case.

The judgment of [illegible] affirmed.

[illegible]

NORTH, P. J., and [illegible], J., concur.

Gen. No. 11499 Agenda 4

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - SECOND DIVISION
MAY TERM, A. D. 1961

DONALD SCHNEIDER, Counter Defendant-Appellant, vs. DAISY LEE RUSSELL, Administratrix of the Estate of Vaughn Russell, Deceased, Counter Plaintiff-Appellee	Appeal from the Circuit Court of Peoria County.

CROW, J.

This appeal grows out of a suit begun by Donald Schneider, then a minor, counter defendant-appellant, the driver of a certain motor vehicle, and William Schneider, the owner thereof, against Daisy Lee Russell, administratrix of the Estate of Vaughn Russell, deceased, counter plaintiff-appellee, for personal injuries and property damages, the decedent Vaughn Russell having been the driver of another motor vehicle involved in the collision in question. A counterclaim for wrongful death of Vaughn Russell was filed by the administratrix. The original complaint was dismissed on motion of the plaintiff-counter defendant-appellant just prior to the trial, and the suit was tried on the counterclaim and the answer thereto. It may be observed that in the counter-defendant's original complaint it was alleged he was driving westerly and the decedent Vaughn Russell was driving easterly at the time and place concerned. It may also be observed that the counter-defendant's original answer to the counterclaim admitted the allegations to that same effect as to the directions the cars were proceeding, though by an amendment to his answer the counter-defendant denied

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - SECOND DIVISION
OCTOBER TERM, A. D. 1951

DOUGLAS BOCHINSKI, Counter Defendant-Appellee, vs. DAIRY LAND COUNTY, Inc. (Joseph Fiorito, of the Estate of Joseph Fiorito, Deceased), Counter Plaintiff-Appellant.	Appeal from the [illegible]

P. O. J.

This appeal [illegible] than a minor, counter defendant [illegible] motor vehicle, and William [illegible] Dairy Land County, Inc. [illegible] deceased, counter plaintiff-appellant, [illegible] property damage, the decedent [illegible] driver of another motor vehicle involved in the collision [illegible] questions. A cause of action [illegible] filed by the administrator. [illegible] on motion of the plaintiff-counter defendant-appellee [illegible] to the trial, and the [illegible] answer thereto. [illegible] original complaint [illegible] was alleged to have driven [illegible] decedent Vaughn [illegible] concerned. It may also be [illegible] original answer to the counterclaim admitted the allegations [illegible] that same effect as to the [illegible] the cause were proceeded [illegible] though by an [illegible] the counterclaim [illegible]

that. It is alleged in the counterclaim that at approximately 1:30 a.m., January 18, 1958, the deceased, Vaughn H. Russell, was driving an automobile on Illinois State Highway Route 116 in an easterly direction toward Peoria, Illinois; the counter-defendant, Donald Schneider, was driving an automobile owned by William Schneider on the same highway in a westerly direction, away from Peoria, and ran head-on into the automobile driven by Vaughn H. Russell, deceased; the impact threw Vaughn H. Russell from his automobile onto the pavement, causing his death; and Vaughn H. Russell, deceased, was in the exercise of all due care and caution for his own safety. The specific acts of negligence alleged in the counterclaim which are material to the issues at this time are as follows:

> That the counter-defendant -
>
> "(a) Did then and there negligently and carelessly operate and drive a 1952 Chevrolet automobile over the center line of said highway onto the wrong side of the road, causing it to strike with and collide with the said 1955 Chevrolet automobile then and there operated and driven by the deceased, Vaughn H. Russell, all contrary to Article 7, Section 54, of the Uniform Act Regulating Traffic on Highways, Chapter 95½, Section 151, Illinois Revised Statutes.
>
> (b) Did then and there negligently and carelessly operate and drive the said automobile belonging to William Schneider at a high, dangerous and excessive rate of speed, causing the driver, Donald Schneider, to lose control of said automobile and collide head-on with the automobile driven by the deceased, Vaughn H. Russell.
>
> * "

At the close of the counterplaintiff's evidence and at the close of all the evidence the counterdefendant made motions for directed verdict and such were denied. The jury returned a verdict of $10,000 in favor of the counterplaintiff and judgment was entered thereon, from which the counterdefendant appeals, following the

that. It is alleged in the counterclaim that at approximately 1:30 a.m., January 18, 1936, the deceased, Vaughn H. Wassell, was driving an automobile on Illinois State Highway Route 116 in an easterly direction toward Peoria, Illinois; the counter-defendant, Donald Schneider, was driving an automobile on the same highway in a westerly direction from Peoria, and the two cars came into the [illegible] Wassell, deceased, the driver of the [illegible] automobile owned by the plaintiff, [illegible] Wassell, deceased, was [illegible] for his own safety. The specific acts of negligence alleged in the counterclaim which are material to the issues herein are as follows:

Then the counter-defendant [illegible] -

"(a) Did then and there negligently and carelessly operate and drive a light delivery automobile over the center line of said highway into the wrong side of the road, causing it to strike with and collide with the said light delivery automobile then and there operated and driven by the deceased, Vaughn H. Wassell, all contrary to Article V, Section 11, of the Motor Act Regulating Traffic on Highways, Chapter 121, Section 121, Illinois Revised Statutes.

(b) Did then and there negligently and carelessly operate and drive the said automobile owned by the William Schneider at a high, dangerous and excessive rate of speed, contrary to the statute, supra. Schneider, by loss control of said automobile and collide head-on with the automobile driven by the deceased, Vaughn H. Wassell.

* *

At the close of the counterplaintiff's evidence and at the close of all the evidence the counterdefendant made motions for directed verdicts and such were denied. The jury returned a verdict of $10,000 in favor of the counterplaintiff and judgment was entered thereon, from which the counterdefendant appeals, following the

denial of his post trial motion for judgment notwithstanding the verdict or new trial.

The counterplaintiff's evidence consisted of a photographer and certain photographs, the testimony of two Deputies Sheriff, James Clevenger and Jerry Allen Sample, and one George Bentley, a passerby, all after occurrence witnesses, Charles Witherspoon, who was called to testify as to the decedent's careful habits, and Daisy Russell, the widow. The only possible occurrence witnesses were the counterdefendant Donald Schneider and his wife Norma, a passenger in the car he was driving. They were called by the counterdefendant as witnesses, objections to their testifying concerning any facts prior to the death of the decedent were sustained, under CH. 51 ILL. REV. STATS., 1959, par. 2, there was no offer of proof by the counterdefendant as to either witness, and there were no other witnesses for the counterdefendant.

The claimed errors argued by the counterdefendant are that the Court should have directed a verdict for the counterdefendant, or granted a new trial, because (1) there is no evidence to prove negligence on the part of the counterdefendant, (2) there is no evidence to prove due care on the part of the counterplaintiff's decedent, and (3) the Court improperly gave the counterplaintiff's instructions 6 and 7. The counterdefendant urges that, as to the evidence, the verdict and judgment are contrary to the manifest weight of the evidence and also are not supported by any evidence. The counterplaintiff argues the evidence is sufficient to show negligence of the counterdefendant which caused the death, and due care of the decedent, and there was no error in the instructions.

The accident, a collision between automobiles respectively operated by Vaughn Russell, deceased, and Donald Schneider, counter-

denial of his post trial motion for judgment notwithstanding the verdict or new trial.

The counterplaintiff's evidence consisted of a [illegible] and certain photographs, the testimony of [illegible] James Cleveland and Mary Ellen [illegible], and an [illegible] passenger, all after accounting [illegible] was called to testify as to the damage [illegible] Daisy Harrell, the wife. The [illegible] were the counterclaim [illegible] passenger in the car in question. [illegible] defendant as witnesses, [illegible] any facts prior to the [illegible] under Ga. Code [illegible] proof by the [illegible] no other witnesses [illegible].

The digest [illegible] the court should have [illegible] or granted a new trial, because (1) [illegible] negligence on the part of the counterclaim [illegible] evidence to prove the [illegible] decedent, and (3) the court [illegible] instructions C and 7. The counterclaim [illegible] evidence, the verdict and judgment are [illegible] weight of the evidence and are not supported by any evidence. The counterplaintiff argues the evidence is sufficient to show negligence of the counterdefendant which caused the death, and the care of the decedent, and there was no error in the instructions.

The accident, a collision between automobiles [illegible] operated by Vaughn Russell, deceased, and Dennis Johnston, counter-

defendant, occurred on Route 116 just west of Peoria, about 1:00 a.m., January 18, 1958. The two investigating officers, Jerry A. Sample and James Clevenger, were parked in a gas station, a short distance east of the scene of the accident, where they first learned of it. They drove west on Route 116. Route 116 is a four-lane, hard surfaced highway, at this point, which slopes downward in a westerly direction, and then across a 600-700 foot bridge, and the road then branches off beyond its westerly end to the airport. The road was brick. Near the foot of that grade and some distance from the east end of that bridge, they saw a body on the south half or eastbound part of the pavement. In the middle of the bridge, facing diagonally in a southeasterly direction, was the Schneider car with the rear wheels against the north curbing. Sample got out of the squad car near the Schneider car, while Clevenger returned, in the squad car, to the body on the highway. Schneider was lying across the front seat of his car, with his feet on the driver's side. Mrs. Schneider was standing outside of the car on the passenger's side. Russell was determined to be alive at that time, and an ambulance was called, though he was deceased upon arrival at the hospital. The roadway was unlit, except for a flashlight in the hands of the officer and the headlights of the squad car. The decedent Russell's car was off the south side of the road, backed down against a tree, 20-25 feet from the pavement and the body, a little bit east of the body. After the injured were taken to the hospital and the Schneider car towed away, the officers went to the hospital, and came back after daybreak to complete their investigation. About 6:30 a.m., that same morning, they paced off distances and wrote up their report, which showed skid marks on the pavement about 100 feet long, from near

defendant, occurred on Route 110 just west of Peoria, about 1:00 a.m., January 13, 1955. The two investigating officers, Jerry A. Sample and Jesse Cleveger, were passing in a patrol car, a short distance east of the scene of the accident, when they first learned of it. They drove west on Route 110. Route 110 is a four-lane, hard surface highway, at this point, which crosses downtown in a westerly direction, [illegible] the Illinois River, and the road then ascends [illegible] airport. The town was [illegible] and some distance from the same [illegible] the south half of [illegible] the bridge, facing [illegible] Sohneider was [illegible] Sample got out of the squad car [illegible] Cleveger remained [illegible] Schneider was lying across the [illegible] feet on the driver's side. [illegible] of the car on the passenger's side. [illegible] be alive at that time, but [illegible] deceased upon arrival at the hospital. [illegible] except for a flashlight in the hands [illegible] of the squad car. [illegible] side of the road, lacked some [illegible] pavement and the body, a little [illegible] injured were taken to the hospital and the Schneider car towed away, the officers went to the hospital, and came back after daybreak to complete their investigation. About 6:30 a.m., that same morning, they paced off distances and wrote up their report, which showed skid marks on the pavement about 100 feet long, from near

the center of the road to the resting place of the Schneider car on the north side of the bridge. Sample testified, also, as to skid marks wavering back and forth across the center of the pavement out on the bridge, west of the place he thought was the point of impact. Clevenger said they could not determine the point of impact. About 25 feet west of the body there was some debris on the highway. Sample said a bumper guard and other debris off a car was on the south half or eastbound side of the roadway, that he had seen it with his flashlight, and he did not see any debris in the westbound lane. Clevenger said there was a small piece of a bumper or some trash on the roadway, but could not say where it was in relation to the centerline, which centerline was not clear.

Another after occurrence witness, George Bentley, came along the highway just before the police arrived and he said he was driving west on Route 116, he had to drive around trash on the right or north side of the roadway before arriving at the Schneider car, and about opposite the place where the trash was he saw what appeared to be an overcoat lying on the south or left side of the road, while he was going downgrade before he got to the east end of the bridge. Bentley was not sure whether the wreckage was on both sides of the center of the highway. He could not say whether he noticed the center line or not. He was getting ready to turn left at the bridge.

All the witnesses agreed that the Schneider car, with the counterdefendant behind the wheel, came to rest about halfway across the bridge - some 300 to 350 feet from the east or Peoria end of the bridge, and Sample and Clevenger said the body of Russell, his car, and the debris were from 125 to 200 feet up the hill, east and toward Peoria, from the east end of the bridge. Sample and Clevenger differed somewhat in their recollection of the length of

the center of the road to the resting place of the Schneider car on the north side of the bridge. Dangle testified, also, as to skid marks wavering back and forth across the center of the pavement out on the bridge, west of the place he claim he was the point of impact. Clever, as said every [illegible] of determining the point of impact. About 20 feet west of the bridge there was a [illegible] on the highway. Sample said a [illegible] and a [illegible] of a car was on the north half of [illegible] road, that he had seen it with [illegible] Clarkville, [illegible] in the neighboring town. Witness said there was a [illegible] piece of a bumper or some trash [illegible] the roadway, but could [illegible] where it was in relation to the [illegible] of the [illegible] closer.

Another after [illegible] the [illegible], came along the highway just before the police arrived [illegible] driving west on Route 112, he had to move [illegible] the right or north side of the roadway [illegible] at the Schneider car, and about opposite the place where the [illegible] was he saw what appeared to be an overturned [illegible] on the left side of the road, while he was [illegible] to pass to the east end of the bridge. Hartley was [illegible] the wreckage was on both sides of the center of the highway. He could not say whether he noticed the center line or not. He was, [illegible], ready to turn left at the bridge.

All the witnesses agreed that the Schneider car, with the counterdefendant behind the wheel, came to rest above highway across the bridge - some 300 to 350 feet from the east or Peoria end of the bridge, and Dangle and Clevenger said the body of Hansell, his car, and the debris were from 120 to 200 feet up the hill, east and toward Peoria, from the east end of the bridge. Sample and Clevenger differed somewhat in their recollection of the length of

the skid marks apparently left by the Schneider car. When they inspected the scene of the accident more closely after daybreak, 5 or 6 hours after the accident, they both saw skid marks on the road, starting close to the center line, looping over to the South side of the road - into the eastbound lane for traffic moving toward Peoria - then back to the north side, and ending up on the bridge. Sample said they ended right where the Schneider car was stopped. Clevenger did not remember where they ended. Sample said they started east of the bridge about 100 feet, and extended 350 to 500 feet down the hill and across the bridge half-way. Clevenger said he saw 100 feet of skid marks on the bridge, and some skid marks east of the bridge.

Daisy Russell, the widow, testified, so far as now relevant, that the decedent was in good health, worked regularly, stated his wages, left the widow as his only dependent, and had not been drinking when he left the residence at 10 p.m. the evening of the accident. The counterdefendant made no objection to any of her testimony, made no motion to strike any of it, and did not cross examine her. Charles Witherspoon testified of experiences riding in the decedent's car, that the decedent had not to his knowledge gone through any stop signs or stop lights or exceeded speed limits or been involved in any accident or been seen to drink, and had driven a car all his life since he was old enough to drive. The counterdefendant made no objection to any of his testimony, and made no motion to strike any of it.

The photographs of the decedent Russell's car taken after the accident and admitted in evidence, show extensive damage to the left front and left side. The jury could reasonably find from

the skid marks apparently left by the Schneider car. When they inspected the scene of the accident more closely after daybreak, 5 or 6 hours after the accident, they began saw skid marks on the road, starting close to the center line, looping over to the South side of the road - into the eastbound lane for traffic moving toward Peoria - then back to the north side, and ending up on the bridge. Sample said they noted glass where the Schneider car was stopped. Cleveger did not remember where they noted. Sample said they started east of the bridge about 150 feet, and extended 300 to 500 feet down the hill and across the bridge. Cleveger said he saw 100 feet of skid marks on the bridge, and more skid marks east of the bridge.

Daisy Russell, the widow, testified, as far as is relevant, that the decedent was in good health, worked regularly, earned his wages, left the widow as his only dependent, and had not been drinking when he left the residence at 10 p.m. the evening of the accident. The counterdefendant made no objection to any of her testimony, made no motion to strike any of it, and has no cross examine her. Charles Kilbourgson was called as a witness testifying to the decedent's car, that the decedent had not to his knowledge done through any stop signs or stop lights or exceeded speed limits or been involved in any accident or been over in ditch, and had driven a car all his life since he was old enough to drive. The counterdefendant made no objection to any of his testimony, and made no motion to strike any of it.

The photographs of the decedent Russell's car taken after the accident and admitted in evidence, show extensive damage to the left front and left side. The jury could reasonably find from

this and the other evidence that the Russell car was sideswiped on the left side. The Russell car was clearly travelling easterly toward Peoria; and the jury could properly have found from all the circumstances that it was on the right or eastbound side of the road, as the body of Russell was thrown onto the pavement in that eastbound lane of traffic, Russell's car was evidently knocked to the right and off the road to the south, where it was found after the collision, and there was evidence of debris in the south half or eastbound part of the pavement, tending to establish the point of impact as being approximately there.

From Sample's testimony particularly, it is indicated that the skid marks started about 100 feet up the grade and led half-way across the bridge, about 300 feet, and ended where the Schneider car stopped. From Sample's testimony, the skid marks apparently started just a few feet west of the probable point of impact, as indicated by the debris. The skid marks, extensive as they were, and wavering across the center line of the pavement as there is evidence they did, tended to establish, and the jury might reasonably have inferred therefrom, excessive speed, YOUNG v. PATRICK (1926) 323 Ill. 200, if they were made by the counterdefendant's car which the jury could have inferred they were, and they are competent evidence that the counterdefendant's car could not be stopped in the space that was apparently required to stop it under the then existing circumstances. The jury had a right to consider those facts and could reasonably infer from those and the other facts and circumstances in evidence, including the extensive damage to the Russell car and the relative positions of the two cars after the collision, that the Schneider car was travelling at an

this and the other evidence that the Russell car was sideswiped on the left side. The Russell car was clearly travelling eastwardly toward Peoria; and the jury could properly have found from all the circumstances that it was on the right or southbound side of the road, as the body of Russell was thrown onto the pavement in that southbound lane of traffic. Russell's car was violently thrown to the right and off the road to the south, where it was found after the collision, and there was evidence of debris in the south half or southbound part of the pavement, which established the point of impact as being approximately there.

From Sampley's testimony particularly, it is inferred that the skid marks started about 100 feet up the road and had half-way across the bridge, about 300 feet, a distance before the defendant's car stopped. From Sampley's testimony, the southbound apparently showed just a few feet west of the probable point of impact, as indicated by the debris. The skid marks, however, as they were, and wavering across the center line of the pavement as there is evidence they did, tended to substantiate, and the jury might reasonably have inferred therefrom, excessive speed. KOHN v. PATTON (1926) 323 Ill. 200. If they were made by the southbound defendant's car which the jury could have inferred they were, and if they are competent evidence that the northbound defendant's car could not be stopped in the space that was apparently required to stop it under the then existing circumstances. The jury had a right to consider those facts and could reasonably infer from those and the other facts and circumstances in evidence, including the extensive damage to the Russell car and the relative positions of the two cars after the collision, that the defendant car was travelling at an

excessive rate of speed under the circumstances. The counterdefendant emphasizes other inferences which he argues are suggested by the evidence, - that since the skid marks crossed the center line on both sides they could conceivably have been made by either the counterdefendant's car or the decedent's car, - or they may have been made by other vehicles coming along during the night, - or they are meaningless because the point of impact could not be established, - or they may have been made by the counterdefendant's car after the collision and merely indicate it was out of control at that time, - or they may have been made by the decedent's car in an attempt to return to the south or eastbound side of the road. Those and other possibilities suggested by the counterdefendant all suffer from the same lack of direct proof as characterizes the inference or conclusion adopted by the jury: TENHANT etc. v. PEORIA etc. RY. CO. (1943) 321 U. S. 29, 88 L. Ed. 520.

There was sufficient circumstantial evidence, under the circumstances, to sustain the verdict on the question of the counterdefendant's negligence. We further believe there was, under the circumstances, sufficient circumstantial and other evidence of the decedent's due care to make that also a question of fact for the jury and not just a question of law. With respect to the counterdefendant's motions for directed verdict and his post trial motion for judgment notwithstanding the verdict there is evidence which, standing alone and taken with all its reasonable intendments and inferences most favorable to the counterplaintiff, tends to prove the material elements of her case: LINDROTH v. WALGREEN CO. et al. (1950) 407 Ill. 121. With respect to the counterdefendant's post trial motion for new trial and his contention that the verdict and judgment are contrary to the manifest weight of the evidence, the verdict is not clearly, plainly, and indisputably against the weight of the evidence, - an opposite conclusion is not clearly evident:

excessive rate of speed under the circumstances. The counter-defendant emphasizes other differences which he alleges are evidenced by the evidence, - that place the skid marks crossed the center line of both sides; they could conceivably have been made by either the counterdefendant's car or the decedent's car, - or they may have been made by other vehicles under similar circumstances, - or they are irrelevant because the place of impact could not be established, - or they may have been made by the counterdefendant's car after the collision. Clearly, there is ample evidence to support the verdict in this case. In fact, it was an attempt to return to the rule of conclusiveness made of the trial judge and other possibilities suggested by the counterdefendant all suffer from the same lack of merit. Jurors are entitled to draw inferences or conclusions adopted by them: Chicago Ry. Co. v. Ferrick, 280 Ill. 280, 283, 117 N. E. 424.

Where was sufficient circumstantial evidence, as was the circumstances, to sustain the verdict in the grant of the counterdefendant's negligence. We further believe there was, under the circumstances, sufficient circumstantial evidence of the decedent's due care to make the question of fact for the jury and not just a question of law. With respect to the counterdefendant's motions for directed verdict and his post trial motion for judgment notwithstanding the verdict there is evidence which standing alone and taken with all the reasonable inferences and inferences most favorable to the counterplaintiff, tends to prove the material elements of her case: Lindquist v. Wilkowski, et al. (1930) 340 Ill. 123. With respect to the counterdefendant's post trial motion for new trial and his contention that the verdict and judgment are contrary to the manifest weight of the evidence, the verdict is not clearly, plainly, and indisputably against the weight of the evidence, - its opposite conclusion is not clearly evident:

PIPER et al. v. LAMB et al. (1960) 27 Ill. App. (2) 99. Where a difference of opinion as to the inference that may legitimately be drawn from evidentiary facts exists the questions of negligence and contributory negligence ought to be submitted to the jury, - it is primarily for the jury to draw the inference: GLOUDMAN et al. v. BEFFA et al. (1955) 7 Ill. App. (2) 276; PIPER et al. v. LAMB et al., supra. It is no answer to say that the verdict involved speculation and conjecture; whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is necessarily required on the part of those whose duty it is to determine the dispute by choosing from the facts in evidence what seems to them to be the most reasonable inference; only where there is a complete absence of probative facts to support the conclusion or inference reached does reversible error appear in this respect: LAVENDER etc. v. KURN et al. (1946) 327 U. S. 645, 90 L. Ed. 916. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury, - the very essence of its function is to select from among possibly conflicting inferences and conclusions to be drawn from the evidence that which it considers most reasonable, - and that conclusion or inference cannot be ignored: TENNANT etc. v. PEORIA etc. RY. CO. (1943) 321 U. S. 29, 88 L. Ed. 520.

In considering the question of due care on the part of the counterplaintiff's decedent, it is well to remember that that cannot always be shown by direct proof, but that the evidence adduced by the counterplaintiff should disclose facts from which it may reasonbly be inferred that the decedent was in the exercise of due care;

excessive rate of speed under the circumstances. The counter-defendant emphasizes other inferences which he argues are suggested by the evidence, - that cross the skid marks crossed the center line on both sides, they could conceivably have been made by either the counterdefendant's car or the decedent's car, - or they may have been made by other vehicles coming along earlier, - or they are [illegible] because the [illegible] could not be established, - or they may have been made by the counterdefendant's car after the collision. [illegible] as that time, - or they may have been [illegible] an attempt to return to the roadway or [illegible] the road. Those and other possibilities suggested by the counterdefendant suffer from the same lack of direct proof as characterizes the inference or conclusion adopted by the jury: [illegible] etc. [illegible] (1942) 321 [illegible] 2d, [illegible] 4d. 4d.

Where are sufficient circumstantial evidence, under the circumstances, to support the verdict on the question of the counterdefendant's negligence. We further believe there was, under the circumstances, sufficient circumstantial evidence of the decedent's due care to make the question of her for the jury and not just a question of law. With respect to the counterdefendant's motions for directed verdict and his post trial motion for judgment notwithstanding the verdict, there is evidence which, regarding alone and taken with all its reasonable inferences and inferences most favorable to the counterplaintiff, tends to prove the material elements of her case: [illegible] v. [illegible] et al. (1950) 407 Ill. 121. With respect to the counterdefendant's post trial motion for new trial and his contention that the verdict and judgment are contrary to the manifest weight of the evidence, the verdict is not clearly, plainly, and indisputably against the weight of the evidence, - its opposite conclusion is not clearly evident:

PIPER et al. v. LAMB et al. (1960) 27 Ill. App. (2) 99. Where a difference of opinion as to the inference that may legitimately be drawn from evidentiary facts exists the questions of negligence and contributory negligence ought to be submitted to the jury, - it is primarily for the jury to draw the inference: CLOUDMAN et al. v. BEFFA et al. (1955) 7 Ill. App. (2) 276; PIPER et al. v. LAMB et al., supra. It is no answer to say that the verdict involved speculation and conjecture; whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is necessarily required on the part of those whose duty it is to determine the dispute by choosing from the facts in evidence what seems to them to be the most reasonable inference; only where there is a complete absence of probative facts to support the conclusion or inference reached does reversible error appear in this respect: LAVENDER etc. v. KURN et al. (1946) 327 U. S. 645, 90 L. Ed. 916. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury, - the very essence of its function is to select from among possibly conflicting inferences and conclusions to be drawn from the evidence that which it considers most reasonable, - and that conclusion or inference cannot be ignored: TENNANT etc. v. PEORIA etc. RY. CO. (1943) 321 U. S. 29, 88 L. Ed. 520.

In considering the question of due care on the part of the counterplaintiff's decedent, it is well to remember that that cannot always be shown by direct proof, but that the evidence adduced by the counterplaintiff should disclose facts from which it may reasonbly be inferred that the decedent was in the exercise of due care;

[illegible] et al. v. [illegible] et al. (1900) 37 [illegible] App. (2) 7). Where a difference of opinion as to the inference that may legitimately be drawn from evidentiary facts exists the question of negligence and contributory negligence cannot [illegible] - it is primarily for the jury to draw the inference. [illegible] et al. v. [illegible] et al. (1900) [illegible] App. (2) [illegible] et al. v. [illegible] et al., supra. [illegible] - volved specialists and corporations [illegible] figure of the evidence is such that [illegible] by fair minds [illegible] inferences, a nonsuit of [illegible] required on the part of those [illegible] disputes by choosing from the [illegible] to be the most reasonable [illegible] adverse of probative [illegible] reached does [illegible] [illegible] v. [illegible] et al. (1900) [illegible] 2. [illegible] point of judicial review is the [illegible] inference or conclusion drawn by the jury - the very essence of its function is to select from [illegible] and conclusions to be drawn from the evidence that which is considered most reasonable - and that conclusion or inference cannot be ignored. [illegible] v. [illegible] et al. (1900) [illegible] 2. 29, 56 L. Ed. 320.

In considering the question of the role of the part of the contributorily's decedent, it is well to remember that that cannot always be shown by direct proof, but that the evidence adduced by the contributorily should disclose facts from which it may reasonably be inferred that the decedent was in the exercise of due care;

the question of contributory negligence is one which is ordinarily preeminently a fact for the consideration of the jury; and unless it can be said the action of the decedent was clearly and palpably negligent it is not within the province of the court to substitute its judgment for that of the jury which is provided for the purpose of deciding that as well as the other questions of fact in the case: BLUMB v. GETZ (1937) 366 Ill. 273. It cannot be said here that all reasonable minds would reach the same conclusion, that is, that the facts do not establish due care on the part of the decedent, - or that there is no competent evidence tending to show the decedent was exercising due care or to raise a reasonable inference thereof; we cannot clearly see that the death of the decedent was the result of his own negligence: OSBORNE v. REDELL et al. (1959) 22 Ill. App. (2) 193. In RITCERS v. CITY OF GILLESPIE (1953) 350 Ill. App. 485 and I.C.R.R. CO. v. OSWALD (1930) 338 Ill. 270, referred to by the counterdefendant, the plaintiffs were held to be guilty of contributory negligence as a matter of law under states of fact having no resemblance to those in the present case. In DUFFY et al. v. CONTESI (1954) 2 Ill. (2) 511, also cited by the counterdefendant, the jury's verdict was for the defendant, evidently finding the plaintiff's decedent was contributorily negligent, and that was affirmed, - the verdict being, of course, different than the verdict here, - and the facts also being entirely different. In CASEY v. CHICAGO RYS. CO. (1915) 269 Ill. 386 cited by the counterdefendant the defendant was held not guilty as a matter of law of negligence, under facts completely dissimilar to those present in the instant case.

Where there is no eye witness to an accident who is competent to testify relative to the due care of a party the exercise of due care may be shown by testimony as to the party's careful habits, in

the question of contributory negligence is one which is ordinarily presentmently a fact for the consideration of the jury; and a fact it can be said the action of the decedent was clearly and palpably negligent it is not within the province of the court to substitute its judgment for that of the jury which is provided for the purpose of deciding that as well as the other questions of fact in the case: BLEEN v. GRTA (1937) 260 Ill. 472. It cannot be said here that all reasonable minds would reach the same conclusion, namely, that the facts do not establish due care on the part of the decedent, - or that there is no competent evidence in dispute to show that decedent exercised due care or to raise a reasonable inference, however, we cannot clearly see that the death of the decedent was the result of his own negligence: DE CAMP v. CHAPPEL et al. (1937) 282 Ill. App. (2) 192. In BRIGHAM v. CITY of CHICAGO (1939) 372 Ill. App. 362 and I.C.R.R. CO. v. OSWALD (1939) 372 Ill. 272, referred to by the contendents here, the plaintiffs were held to be guilty of contributory negligence as a matter of law under cases of fact having no resemblance to those in the present case. In GRAY et al. v. POLLEN (1934) 2 Ill. (2) 311, also cited by the contendents, the jury's verdict was for the defendant, evidently finding the plaintiff's decedent was contributorily negligent, and the was affirmed, - the verdict being, of course, different from the verdict here, - and the facts also being entirely different. In GRAY v. CHICAGO RYS. CO. (1915) 269 Ill. 348 cited by the contendents the defendant was held not guilty as a matter of law of negligence, under facts completely dissimilar to those present in the instant case.

Where there is no eye witness to an accident who is competent to testify relative to the due care of a party the exercise of due care may be shown by testimony as to the party's general habits, in

addition to any facts and circumstances in evidence from which it may reasonably be inferred the party was in the exercise of due care; evidence of careful habits, under those circumstances, has been held to raise a presumption that the decedent was in the exercise of due care and caution at the time the injuries resulting in death were sustained, - such evidence, together with the presumption that all persons observe the instincts of self preservation, has been held sufficient to warrant a finding of freedom from contributory negligence by a jury: DUFFY et al. v. CORTESI, supra; DALLEMAND et al. v. SAALFELDT (1898) 175 Ill. 310 (cited by the counterdefendant); ROHR v. CLUVER (1959) 20 Ill. App. (2) 548; YOUNG v. PATRICK (1926) 323 Ill. 200; HUGHES etc. v. WABASH R.R. CO. (1950) 342 Ill. App. 159; HANN v. BROOKS et al. (1947) 331 Ill. App. 535.

Under CH. 51 ILL. REV. STATS., 1959, par. 2, being Section 2 of the Evidence Act, the counterdefendant here was clearly not a competent witness in his own behalf, nor was his wife when called by the counterdefendant, as to anything occurring before the death of the counterplaintiff's decedent, unless they became competent by reason of the counterplaintiff's offering some evidence that, within the exceptions stated in Section 2, removed the disqualification: HANN v. BROOKS, et al., supra. The present case does not come within any of the five exceptions stated in Section 2 of the Evidence Act, - the counterdefendant and his wife did not offer to "testify to facts occurring after the death of such deceased person"; no agent of the deceased, in behalf of the counterplaintiff, testified "to any conversation or transaction between such agent and the opposite party or party in interest"; the counterplaintiff did not "testify

addition to any facts and circumstances in evidence from which it may reasonably be inferred the party was [illegible] the exercise of due care; evidence of careful habits, [illegible] have currently been held to raise a presumption [illegible] in accordance with the course of the case and conclusion as the [illegible] in doubt were sustained, - such evidence, [illegible] the presumption that all persons observe the [illegible] has been held sufficient to warrant a finding [illegible] contributory negligence by a [illegible] BALLENTINE et al. v. BALLENTINE (1937) [illegible] Ill. [illegible] the counterclaim case); [illegible] v. [illegible] (1937) [illegible] Ill. App. [illegible]; YOUNG v. [illegible] (1932) [illegible] Ill. [illegible] co. (1930) 342 Ill. App. [illegible] [illegible] (1937) [illegible] Ill. App. 333.

Under the [illegible] Section 2 of the Evidence Act, the [illegible] as [illegible] a competent witness in Illinois [illegible], or [illegible] called by the counterplaintiff, [illegible] before the death of the counterplaintiff's decedent, [illegible] reason of the counterplaintiff's [illegible], [illegible] the, within the exception stated in Section 2, [illegible] the disqualification: HAHN v. [illegible], et al., supra. The present case does [illegible] within any of the five exceptions stated in Section 2 of the Evidence Act, - the counterclaim and his wife did not offer to testify to facts occurring after the death of such deceased person; no agent of the deceased, in behalf of the counterplaintiff, testified "to any conversation or transaction between such agent and the opposite party or party in interest"; the counterplaintiff did not "testify

* * * to any conversation or transaction with the opposite party or party in interest"; no witness, not a party, or party in interest, or agent of the decedent, testified "to any conversation or admission by any adverse party or party in interest, occurring before the death and in the absence of such deceased person"; and no "deposition of such deceased person" was read in evidence at the trial. Accordingly, the counterdefendant and his wife were not competent witnesses on his behalf; there was, therefore, no competent eye witness to the accident; and, hence, testimony as to the decedent's careful habits was admissible as tending to establish his due care, and there was testimony to that effect. Beyond that, there was other competent evidence on the question of due care of the decedent which was entitled to be considered, such as the physical facts following the accident, the probable place of impact, the skid marks, the photographs of the decedent's car, the location of the decedent's body, the location afterwards of his car, and the location of debris, - due care on the part of the deceased may be proved in the same manner as negligence and by circumstantial as well as by direct evidence: HAHN v. BROOKS et al., supra. It is interesting to observe that in HAHN v. BROOKS et al. though the widow of the decedent testified in substance along the same general lines as did the widow of the decedent in the case at bar the appellants there did not even urge that such brought the situation within some exception to Section 2 of the Evidence Act or removed the disqualification of otherwise incompetent witnesses thereunder. The testimony of the widow of the decedent here was quite different in nature from the testimony of the widower of the decedent involved in ROUSE v. TOMASEK (1935) 279 Ill. App. 557, to which the counterdefendant refers, and there was no offer of proof at all as to the probable testimony of the counterdefendant and his wife here as there was in that case.

* * * to any conversation or transaction with the opposite party or party in interest"; no witness, not a party, or party in interest, or agent of the deceased, testified "to any conversation or admission by any adverse party or party in interest, occurring before the death and in the absence of such deceased person"; and no "deposition of such deceased person" was read in evidence on the trial. Accordingly, the counterclaimant did not give more than a preponderance on his behalf; there was, therefore, a competent eye witness to the accident; and, hence, testimony as to the decedent's habits was admissible as to show he overhauled his own car, and also was testimony to that effect. Assume that, there was other competent evidence on the question of the care of the decedent which was established to be consistent, such as the physical facts following the accident, the probable place of impact, the skid marks, the damage of the decedent's car, the location of the decedent's body, the location afterwards of his car, and the location of tracks. - the case on the part of the deceased may be proved by the same character as negligence and by circumstantial as well as by direct evidence: HAMM v. BROOKS et al., supra. It is interesting to observe that in HAMM v. BROOKS et al. though the widow of the decedent testified in substance along the same several lines as did the widow of the decedent in the case at bar the appellee in there did not even care that such brought the situation within some exception to Section 2 of the Evidence Act or removed the disqualification of otherwise incompetent witnesses thereunder. The testimony of the widow of the decedent here was quite different in nature from the testimony of the widower of the decedent involved in BURGE v. TOMASEK (1935) 279 Ill. App. 527, to which the counterclaimant refers, and there was no offer of proof at all as to the probable testimony of the counterclaimant and his wife here as there was in that case.

The counterplaintiff's Instruction No. 6 was as follows:

"The Court instructs the jury that it is not necessary for the counterplaintiff to prove by direct and positive evidence alone that the deceased was in the exercise of ordinary care and caution for his own safety and that of his automobile at and before the time and place alleged in the Counterclaim, but this may also be proved by circumstantial evidence, that is by proof of such facts and circumstances as give rise to a reasonable inference that he was in the exercise of due care, if the facts and circumstances proved are sufficient to raise such inference."

The counterplaintiff's Instruction No. 7 was as follows:

"The court instructs the jury that,

"While the counterplaintiff must prove her case by a preponderance of evidence, still the proof need not be the direct evidence of persons who saw the occurrence sought to be proved, but facts may also be proved by circumstantial evidence, that is, by proof of circumstances, if any, such as give rise to a reasonable inference in the minds of the jury of the truth of the facts alleged and sought to be proved, provided such circumstances, together with all the evidence in the case, constitute a preponderance of evidence."

The only objection thereto which the counterdefendant urges is that inasmuch as there were eye witnesses, himself and his wife, competent to testify, those instructions should not have been given.

In view of our determination that the counterdefendant and his wife were not competent to testify, and that due care of the decedent and negligence of the counterdefendant may be proved by, among other things, circumstantial evidence, we find no error in the giving of these instructions.

Accordingly, the judgment should be and is affirmed.

Spurgin P. J. concurs.

WRIGHT, J. Concurs

A F F I R M E D.

WRIGHT J. concurs

Abstract

Gen. No. 11515 Agenda 10

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - SECOND DIVISION
MAY TERM, A. D. 1961

IN THE MATTER OF THE PETITION OF EVERETT COX, et al., Petitioners-Appellees, TO DISCONNECT TERRITORY FROM THE CITY OF CREST HILL, ILLINOIS, et al., Respondents-Appellants.	Appeal from County Court of Will County.

CROW, J.

This is an appeal by the respondents, City of Crest Hill, Illinois, et al., from an order of the County Court of Will County entered December 20, 1960 granting a petition of the petitioners-appellees, Everett Cox, et al., filed September 13, 1960, to disconnect certain territory comprising approximately 90 acres from the City of Crest Hill and disconnecting the same. In addition to other findings, the Court found that the territory concerned, if disconnected, will not be a territory wholly bounded by one or more municipalities, that being one of the allegations of the petition. The City of Crest Hill in its answer to the petition had denied, inter alia, "that said disconnected territory will not be wholly bounded by one or more municipalities or wholly bounded by one or more municipalities, and a river or a lake."

The proceeding seeking a disconnection was under CH. 24 ILL. REV. STATS. (1959) par. 7-39a, which, so far as material, provides that:

"Within one year of the organization of any municipality under the provisions of Articles 2 and 3, of this Act, any territory which has been included therein may be disconnected from such municipality if the territory sought to be disconnected is (1) upon the border, but within the boundary of the municipality, (2) contains 20 or more acres, (3) if disconnected will not result in the isolation of any part of the municipality from the remainder of the municipality, and (4) if disconnected will not be a territory wholly bounded by one or more municipalities or wholly bounded by one or more municipalities and a river or lake, in the following manner:

A written petition directed to the county judge of the county in which the territory proposed to be disconnected is located and if such territory is located in more than one county then to the county judge of the county in which the greater part of such territory may be located, which petition shall be signed by a majority of the electors, if any, residing within the territory and also signed by a majority of the owners of record of land in such territory, and also representing a majority of the area of land in such territory, shall be filed with the clerk of the county court within one year of the organization of any municipality under the provisions of Articles 2 and 3 of this Act. The petition shall set forth the description of the territory to be detached from such municipality, shall allege the pertinent facts in support of the disconnection of such territory and shall pray the county judge to detach the territory from the municipality.

* *

The public hearing may be continued from time to time by the county judge. After such public hearing and having heard any and all persons desiring to be heard, including the municipality and any and all persons residing in or owning property in the territory involved or in the municipality from which such territory is sought to be disconnected, if the county judge shall find that all the allegations of the petition are true, the county judge shall grant the prayer of the petition and shall enter an order disconnecting the territory from the municipality, which order shall be entered at length in the records of the county court and the clerk of the county court shall file a certified copy of such order with the clerk of the municipality from which such territory has been detached. If the county judge shall find that the allegations contained in the petition are not true then the county judge shall enter an order dismissing the same; * * * * * * * * * * * * * * * * *."

The City of Crest Hill was incorporated January 22, 1960. It included within its city limits all of Sections 31, 32, 33 and 34, Township 36 North, Range 10 east of the 3rd principal meridian, in

"Within one year of the organization of any municipality under the provisions of Article V sec. 3, of this act, any territory which was not included therein may be disconnected from such municipality if the territory sought to be disconnected is (1) upon the border, and within the boundary of the municipality, (2) contains 20 or more acres, (3) if disconnected will not result in the isolation of any part of the municipality from the remainder of the municipality, and (4) if disconnected will not be a serious injury to the municipality or any other municipality or school district, bounded by one or more roads, railroads or streams, or by a river or lake. [illegible]

A petition praying [illegible] county in which the territory [illegible] is located and if [illegible] one county line to the other [illegible] the nearest point or [illegible] petition shall be signed by [illegible] if any, residing within the [illegible] a majority of the owners of [illegible] tory, and also residents [illegible] in such territory, shall be filed in the [illegible] county court with the [illegible] municipality which is [illegible] this act. In [illegible] of the territory to be [illegible] shall also be [illegible] petition of such territory [illegible] to issues for consisting [illegible].

[illegible]

The public [illegible] the county [illegible] the county judge, after [illegible] hearing any and all [illegible] ing the municipality and all persons [illegible] or owning property in the territory [illegible] municipality from which such territory is sought to be disconnected, if the county judge [illegible] all the allegations of the petition are true, the county judge shall grant the prayer of the petition and [illegible] order disconnecting the territory from the municipality, which order shall be entered at length in the records of the county court and the clerk of the county court shall file a certified copy of said order [illegible] of the municipality from which such territory was disconnected. If the county judge shall find that the allegations contained in the petition are not true then the county judge shall enter an order dismissing the same;

The City of Great Falls was incorporated January 23, 1892. As included within its city limits all of sections 34, 35, 36 and 36, Township 20 North, Range 10 east of the Jno principal meridian, in

Will County, except for certain lands in Sections 31 and 34 not now material. The territory sought here to be disconnected was the west half (½) of the west half (½) of the Southwest quarter (¼) of Section 32 and that part of the west half (½) of the Northwest quarter (¼) of Section 32 lying south of certain property of the Public Service Co. of Northern Illinois. The south line of the west half (½) of the west half (½) of the southwest quarter (¼) was the south line of Section 32, which was the south border or boundary or city limits at that point of the City of Crest Hill at that time. The portion described as that part of the west half (½) of the northwest quarter (¼) of Section 32 lying south of certain property of the Public Service Co. of Northern Illinois extended north from the west half (½) of the west half (½) of the southwest quarter (¼) to a point about 999 feet south of t e north line of Section 32, which was the north border or boundary or city limits at that point of the City of Crest Hill. The territory sought to be disconnected was, in other words, approximately a 90 acre segment of Section 32 extending northward into that section, lying generally on the west side of the section, from the south line of the section (the south city limits of the City of Crest Hill at that point at that time), and extending northward into the City (which included all of Section 32) to within about 999 feet of the north line of the section (the north city limits of the City at that point). The balance of Section 32 north and east of the territory sought to be disconnected, and all of Section 31 (with an immaterial exception) west of that territory, as well as all of Sections 33 and 34 (with an immaterial exception) further east of that territory were in the City of Crest Hill.

At the time of the filing of the petition, September 13, 1960, out of a total of 11,200 lineal feet bounding the perimeter of the

Hill County, except for certain lands in sections 31 and 32 not now material. The territory sought seems to be disconnected [illegible] half (½) of the east half ([illegible] section 32 and that part of the east half (½) [illegible] (a) of section 32 lying [illegible] Service No. 87 [illegible] (g) of the west half (½) [illegible] line of section [illegible] lands on that point [illegible] portion described as [illegible] quarter (¼) of section [illegible] the service [illegible] (j) of the east half (½) [illegible] about [illegible] acres [illegible] these lands. The service [illegible] words, approximately [illegible] were also [illegible] section, from the [illegible] of the City of [illegible] Hill [illegible] northward into the city [illegible] about 975 feet of the north line [illegible] limits of the City of [illegible] and east of the territory sought to be disconnected, [illegible] section 32 (with an immaterial exception) and [illegible] as well as all of sections 33 and 34 [illegible] further east of that territory [illegible] in the City of [illegible].

As the time of the filing of the petition, [illegible] 13, 1960, out of a total of 11,200 [illegible] were bearing the petitioner [illegible] the

total area sought to be disconnected 125 feet thereof on and being a part of the south line of the west half (½) of the west half (½) of the southwest quarter (¼) of Section 32 (the then south city limits) was bounded to the south, beyond the then south city limits, by, and touched, then unincorporated territory, and the remainder of 11,075 lineal feet of the area sought to be disconnected was bounded by the City of Joliet and the City of Crest Hill. On September 16, 1960, at a special meeting called by the Mayor for that purpose, the City Council of the City of Crest Hill, a quorum being present, adopted an Ordinance annexing to Crest Hill an area southward of its then south city limits at this point including the 125 feet of theretofore unincorporated territory and certain land south of the territory now sought to be detached. A copy of this Ordinance being certified by the City Clerk of the City of Crest Hill was admitted in evidence in the disconnection proceedings, though subject to the objection of the petitioners as to its materiality and validity. The effect of the adoption of this annexation ordinance, if valid, or if not subject to collateral attack, left the territory now sought to be disconnected unquestionably wholly bounded by two municipalities, namely, the City of Joliet and the City of Crest Hill as of the time of the order of December 20, 1960. On October 27, 1960 at a regular meeting of the City Council of Crest Hill at which all the members were present the City Council had determined, upon a motion for reconsideration of the annexation ordinance, not to reconsider the same.

It is the theory of the respondents that the findings of the County Court are contrary to the manifest weight of the evidence and the law, that at the time of filing the petition and at the time of hearing on the petition the territory sought to be disconnected if disconnected would be a territory wholly bounded by one or more municipalities, that the state of facts at the time of hearing

on the petition is determinative rather than the state of facts at the time of filing the petition, and that the validity of the annexation ordinance of September 16, 1960 cannot be collaterally attacked in this proceeding seeking to disconnect certain territory from the city. The theory of the petitioners is that the Court correctly ordered the disconnection within the meaning and purpose of the statute.

We believe that the trial court, while admitting into evidence the certified copy of the foregoing ordinance of annexation, subject to objection, necessarily, by implication, in its finding in favor of the petitioners found that annexation ordinance to be either immaterial, or void. The petitioners urged that this annexation ordinance of September 16, 1960 was not properly adopted in that the City of Crest Hill had no ordinance setting forth the conditions required for or manner of calling a special meeting of the City Council, that only verbal notice of the special meeting at which it was adopted was given the aldermen a few hours prior to the meeting, and one of the aldermen did not receive notice, and that it was obvious that the ordinance was passed in an attempt to thwart the previously filed disconnection proceeding. The trial court made no express finding as to this annexation ordinance as such nor any express ruling on the evidentiary objections of the petitioners thereto. The certified copy thereof was admitted into evidence and was not later stricken from the evidence.

The annexation ordinance of september 16, 1960 purports to have been adopted pursuant to CH. 24 ILL. REV. STATS., 1959, par. 7-11. That statute provides:

> "Whenever any unincorporated territory, containing sixty acres or less, is wholly bounded by one or more municipalities or is wholly bounded by one or more municipalities and a river or lake, such territory may be annexed by any municipality by which it is bounded in whole or in part, by the passage of an ordinance to that effect. The

ordinance shall describe the territory annexed and a copy thereof together with an accurate map of the annexed territory shall be recorded in the office of the recorder of deeds of the county wherein the annexed territory is situated."

As to a city of the type of the City of Crest Hill, the City Council shall consist of the mayor and aldermen; the city council shall determine its own rules of proceeding; a majority of the corporate authorities shall constitute a quorum to do business; the city council may prescribe, by ordinance, the times and places of the council meetings, and the manner in which special council meetings may be called, and the mayor or any three aldermen may call special meetings of the city council: CH. 24 ILL. REV. STATS., 1959, pars. 9-39, 9-41, 9-42, and 9-43.

A void ordinance is subject to a direct or collateral attack whenever its authority is invoked in a judicial proceeding: CITY OF LINCOLN v. HARTS et al. (1911) 250 Ill. 273; PEOPLE ex rel. JAMES etc. v. CHICAGO, BURLINGTON AND QUINCY RAILROAD CO. (1907) 231 Ill. 463.

But, other than as to a void ordinance, the legality of proceedings by which additional territory is added to a municipality cannot be inquired into except upon a direct proceeding by quo warranto, - if the municipality has jurisdiction or authority to proceed any mere errors or irregularities, if any, that may be committed in pursuance of the exercise of such jurisdiction or authority cannot be availed of in a collateral attack upon the annexation proceedings: PEOPLE ex rel. WARREN etc. v. YORK (1910) 247 Ill. 591. The validity of the proceeding by which a municipal corporation is created cannot be determined in a collateral proceeding; an annexation of territory is to that extent a new organization of the municipality, and an act or ordinance providing for annexation is an act for changing the charter of the city and is upon the same footing as to collateral attack as an act for original incorporation; and an annexation proceeding of the city council is not open

to collateral attack for any defect, if any, in the exercise of jurisdiction: PEOPLE ex rel. QUIGGENBERRY etc. v. ELLIS (1912) 253 Ill. 369. Attacks upon the proceedings by which a municipal corporation is formed, or by which territory is annexed to it cannot ordinarily be made in collateral actions but such objections can only be raised by bringing an action of quo warranto: PEOPLE ex rel. MOGANTY et al. FIREK et al. (1955) 5 Ill. (2) 317. An illustration of a direct attack upon annexation ordinances by quo warranto is PEOPLE ex rel. UNIVERSAL OIL PRODUCTS CO. et al. v. VILLAGE OF LYONS (1948) 400 Ill. 82.

We perceive nothing in either CH. 24 ILL. REV. STATS., 1959, par. 7-11 or par. 7-39a that says a municipality may not proceed to annex unincorporated territory by the passage of an ordinance to that effect under par. 7-11 when and because and as long as a petition is pending and undetermined in the County Court under par. 7-39a for the disconnection of an entirely different territory or segment of and then a part of the municipality, - and the petitioners refer us to no case so holding.

So far as the present record is concerned there is nothing to indicate the City of Crest Hill had no jurisdiction or authority to proceed to annex the unincorporated territory referred to in the ordinance of September 16, 1960 simply by the passage of an ordinance to that effect, - it apparently had such jurisdiction or authority under CH. 24 ILL. REV. STATS., 1959, par. 7-11. An ordinance to that effect was in fact passed at a special meeting of the City Council, which meeting was called by the Mayor, at which a majority of the corporate authorities, constituting a quorum, were present, it was passed by the unanimous vote of those present, and it was for the City Council itself to determine its own rules of proceeding. Under

the circumstances, any mere errors or irregularities, if any, that may have been committed in pursuance of the exercise of such jurisdiction or authority cannot be availed of in this collateral attack upon the annexation proceedings.

We are of the opinion that this ordinance of annexation passed on September 16, 1960 was not void, and that its validity could not be collaterally attacked in the present disconnection proceeding, and that for the present purpose and present proceeding it must be considered to be in effect. It is relevant and material. A properly certified copy is in evidence and was not stricken from the evidence. It cannot be overlooked.

It would further appear from RE: DISCONNECTION OF TERRITORY FROM NORTHFIELD (1954) 4 Ill. App. (2) 131 that the determination of the Court in a case of this type should be made on the state of the facts as they exist at the time of the hearing or final disposition of the case rather than as they may have been at the time of the filing of the petition to disconnect, if there is a material difference, - where under the state of the facts at the time of the filing of the petition the Court would have had jurisdiction and the petitioner would have been entitled to relief but under the state of facts at the time of the hearing or final disposition the Court would not have had jurisdiction and the petitioner would not have been entitled to relief. In that case the petition for disconnection contained the signatures of the owners of twenty or more acres, pursuant to the applicable statute. Before the hearing one of the owners withdrew his name and took a voluntary nonsuit, so that those petitioners remaining owned or represented less than twenty acres. Because the petition no longer contained the requisite signatures as to the requisite minimum number of acres the trial court dismissed the petition. The Appellate Court in affirming had this to say, p. 133-134:

the circumstances, any more error or irregularities, if any, that may have occurred in [illegible] of the material of and jurisdiction or authority [illegible] to exercise it. [illegible] rehearsal upon the examination accordingly.

As one of our objects [illegible] ed on September 13, 1940 as we will, [illegible] ses on collateral [illegible] ing, and also for [illegible] to consider and to [illegible] property described [illegible] the evidence. [illegible]

It would [illegible] [illegible] of the court in a [illegible] the facts as they [illegible] sion of the [illegible] the filing of the petition in [illegible] difference, - [illegible] filing of the petition [illegible] petitioner would have [illegible] facts at the time of the [illegible] motions and jurisdiction and the [illegible] plied to relief. [illegible] called the signature of the [illegible] to the equitable estate. [illegible] ministration [illegible] cumstances [illegible] cloaks resulting [illegible] cause the petition no longer contained the requisite signatures or the requisite minimum number of [illegible] petition. The appellate court in affirming and this is why, p. 133-134:

"* * * In BOSTON v. KICKAPOO DRAINAGE DISTRICT, 244 Ill. 577, 91 N.E. 707, a petition was filed in the County Court one year after the district was organized praying that the whole system of proposed work might be abandoned and the district abolished. There the County Court allowed the voluntary withdrawal of several petitioners before any hearing, leaving the remaining petitioners without the requisite ownership of acreage prescribed by statute, and dismissed the petition. In that case, as in the case at bar, it was contended that the time of filing the petition determined the status of the case and that petitioners had no right thereafter to withdraw their names. The court concluded that a contrary rule was established in similar cases, citing LITTELL v. BOARD OF SUPERVISORS, 198 Ill. 205, 65 N.E. 78, and BECK v. POLECAT DRAINAGE DISTRICT, 216 Ill. 56, 74 N. E. 691."

The same principle was applied, in varying factual situations, in LITTELL et al. v. BOARD OF SUPERVISORS (1902) 198 Ill. 205, BECK et al. v. POLECAT DRAINAGE DISTRICT (1905) 216 Ill. 56, and BOSTON v. KICKAPOO DRAINAGE DISTRICT (1910) 244 Ill. 577. By analogy to what was said in BOSTON v. KICKAPOO DRAINAGE DISTRICT, supra, at p. 579, it is the order of the County Court, if and when entered, and not the mere presentation of the petition therefor, which disconnects territory from a municipality under the statute involved in the case at bar.

We therefore believe that one of the statutory requirements for disconnection on this petition to disconnect was not met as to the area concerned as of the time of the hearing or final disposition of the case, namely, that the territory sought to be disconnected if disconnected will not be a territory wholly bounded by one or more municipalities, in view of the ordinance of annexation of September 16, 1960 of the City of Crest Hill. In those respects the order of December 20, 1960 is contrary to the manifest weight of the evidence and the law.

In PEOPLE ex rel. HATHORNE v. MUNRO et al. (1899) 181 Ill. 315, referred to by the petitioners, it was held that, where a petition had been filed in the County Court for an election to organ-

ize a village of North Chicago in a certain theretofore unincorporated area and was still pending and undetermined, an attempted subsequent annexation proceeding by the City of Waukegan as to certain of that same territory was illegal and void. The same thing in principle is held in CITY OF EAST ST. LOUIS v. TOUCHSTONE et al. (1958) 14 Ill. (2) 243, also referred to by the petitioners. The question involved in those cases was quite different from that involved here. Also, the territory concerned in those cases as to the organization of a village or city was the same, so far as material, as the territory involved in the later annexation proceedings, whereas here the pending disconnection proceeding does not concern the same territory as does the later annexation proceeding. The disconnection and annexation proceedings here, respectively, are not conflicting proceedings in the sense the petitioners urge, whereas the village or city organization proceedings and the annexation proceedings, respectively, in the cases cited were conflicting proceedings as they urge. AMERICAN COMMUNITY BUILDERS, INC. et al. v. CITY OF CHICAGO HEIGHTS (1949) 337 Ill. App. 263, the principal remaining case cited by the petitioners has, we believe, no significant resemblance to the case at bar and is not applicable.

The motive, if any, of the City Council of the City of Crest Hill in passing this annexation ordinance at its special meeting on September 16, 1960, three days after the petitioners' suit was filed, and in declining to reconsider the same at its regular meeting October 27, 1960, may not here be inquired into in an effort to nullify that proceeding of the City of Crest Hill.

The order granting the petition to disconnect and disconnecting the territory concerned is in error, and is, accordingly, reversed, and the cause is remanded with directions to dismiss the petition.

REVERSED and REMANDED, with directions.

Spivey, P. J. Concurs.

Wright, J. Concurs.

SPIVEY, P. J. and WRIGHT, J., concur.

61 M 4

In The

Appellate Court of Illinois

Fourth District

A

A. J. Hammer, Plaintiff - Appellant, -vs- Jefferson Oil and Gas Corporation, and Ziegler Coal and Coke Company, Defendants - Appellees.	)	Appeal from the Circuit Court of Jefferson County, Illinois

Honorable Randall S. Quindry, Presiding Judge

Scheineman, J.

This is an appeal by plaintiff from a directed verdict for defendants. The defendants contend the appeal should be dismissed because there was no final judgment from which to appeal.

The plaintiff concedes that no final judgment had been entered by the court when the notice of appeal was filed, and the record contained nothing purporting to be a final judgment. It does show by the judge's minutes that at the conclusion of the trial, the court directed a verdict for the defendants, and the verdict was returned as directed.

Some five months after the notice of appeal was filed, the plaintiff filed a motion in the trial court for judgment on the verdict nunc pro tunc. After hearing, this motion was allowed, and judgment entered.

Thereafter, plaintiff filed in this court a motion "for leave to amend record and abstract," to show the proceedings of the court below after the notice of appeal was filed, and to show the nunc pro tunc judgment on the verdict and revised minutes. This motion was taken with the case, and must now be ruled upon.

The defendants cite Brehm v. Piotrowski, 409 Ill. 87 and Wolcott v. Village of Lombard, 387 Ill. 621, both of which appear to hold that when notice of appeal is filed the jurisdiction of a reviewing court attaches immediately, depriving the local court of jurisdiction, and the reviewing court has no jurisdiction to review proceedings of the local court which occurred after the notice of appeal was filed. The plaintiff contends these cases may be distinguished. Without further consideration of that point, this court finds the appeal must be dismissed on other grounds, and the motion to supplement the record must be denied.

The verdict of the jury is the basis upon which the judgment of the court is entered and is not the judgment of the court. The verdict is not subject to review by appeal until judgment is entered thereon, and when the record fails to show a final judgment there is nothing to review and the appeal must be dismissed. People v. Montgomery, 365 Ill. 478, 481; Le Menager v. Northwestern Barb Wire Co., 296 Ill. App. 568; Mitchell v. Eareckson, 250 Ill. App. 508.

Since the court directed a verdict, no doubt it was intended that judgment be entered thereon, but through some delay or oversight, this was not done. The rule is: "The amend-

ment or nunc pro tunc entry may not be made to supply judicial ommissions * * * or to show what the court might or should have decided, or intended to decide, as distinguished from what it actually did decide * * *." 30 A Am. Jur. Judgments, Sec. 606.

The reason for this rule has been often stated. Referring to entries nunc pro tunc, it is the rule: "The judgments and records of courts cannot rest in parol or upon so uncertain a foundation as a personal recollection of the judge or any other person * * * Where there is no minute or memorial in the records of the court to show that judgment was, in fact, pronounced, it can not be so entered." Stein v. Meyers, 253 Ill. 199; Mack v. Polecat Drainage Dist., 216 Ill. 56. See also the cited section on judgments, 30A Am. Jur. Sec. 606.

The plaintiff cites a number of cases contending they are contrary to this rule, but our examination thereof discloses they are not in point. Amendments to names and titles are not in point nor amendments and nunc pro tunc orders which are based upon a minute made at the previous date.

One of the cases cited is definitely against plaintiff. In re Young's Estate, 414 Ill. 525, 112 NE 2d 113. There the court had approved an executor's final report and made a minute thereof. In accordance with the practice in that court, a photostat was made of the minute and preserved in the court's records. Later the court attempted to discharge the executor on the previous date, and attempted to amend the minute to that effect.

This was held improper for the reasons above stated.

In view of the absence of any record or minute on which to base a judgment prior to the filing of notice of appeal the motion for leave to amend the record and abstract is denied, and there being nothing to appeal from this appeal is dismissed.

Appeal Dismissed.

Hoffman, P.J., and Culbertson, J. concur.

Publish Abstract Only.

Abstract

1st DIVISION

NO. 11421 Abstract only Agenda 16

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
MAY TERM, A.D. 1961

FILED
SEP 1 9 1961
PAUL V. WUNDER
Clerk Appellate Court Second District

ERNEST BASSI, TRUSTEE and PUTNAM COUNTY BANK, a corporation, Plaintiffs-Appellees, vs. DONALD LANGLOSS and ELMA LANGLOSS, Defendants-Appellants.	Appeal from the Circuit Court, Marshall County.

McNEAL, J. -

In Bassi v. Langloss, 28 Ill. App. 2d 97, 170 N.E. 2d 644, this court considered the question whether a county judge is qualified to act as an attorney in a foreclosure proceeding. We ruled that the practice of law by a county judge is against public policy and reversed a decree of foreclosure entered by the circuit court of Marshall County. The Supreme Court granted leave to appeal and approved our ruling, but postponed the effective date of the principle involved until December 3, 1962. Bassi v. Langloss, 22 Ill. 2d 190, 174 N.E. 2d 682. Accordingly, the Supreme Court reversed and remanded the cause to this court to consider the remaining issues on the appeal.

The only question not determined on our previous consideration of this case is the matter of appellees' cross-appeal concerning the amount of the fee allowed their attorney. The facts upon which the cross-appeal is based are fully set forth on pages 100 and 101 of 28 Ill. App. 2d. In brief, Attorney Pace testified that in his opinion the usual, customary and reasonable fee for plaintiff's counsel would be $500. Judge Pucci testified that his fee should be $775. However, plaintiff Bassi testified before the Master that when defendants

No. 11121 Abstract only Vol. 16

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
MAY TERM, A.D. 1961

ERNEST BASSI, INDIVIDUAL and PUTNAM COUNTY BANK, a corporation, Plaintiffs-appellees, vs. DONALD [illegible] and [illegible], Defendants-appellants.	Appeal from the Circuit Court, [illegible] County.

McNEAL, J. -

In Bassi v. [illegible], [illegible] 27, [illegible] Ill. App. 2d 684, this court considered the [illegible] to act as an attorney in a foreclosure proceeding. [illegible] the practice of law by a county judge [illegible] and reversed a decree of foreclosure [illegible] County. The Supreme Court granted leave to [illegible] but postponed the effective date of the [illegible] December 3, 1962. Bassi v. [illegible], 22 Ill. 2d 190, 174 N.E. 2d 682. Accordingly, the Supreme Court reversed and remanded the cause to this court to consider the remaining issue on [illegible].

The only question not determined on our previous consideration of this case is the amount of appellees' cross-appeal concerning the amount of the fee allowed their attorney. The facts upon which the cross-appeal is based are fully set forth on pages 200 and 201 of 28 Ill. App. 2d. In brief, attorney Pace testified that in his opinion the usual, customary and reasonable fee for plaintiff's counsel would be $500. Judge Bucci testified that his fee should be $775. However, plaintiff Bassi testified before the Master that when defendants

tendered the amount due on the foreclosure, Judge Pucci stated that he would accept $250 for his services. On this evidence the chancellor fixed Judge Pucci's fee at $350. Cross-appellants contend that the fee should have been fixed in an amount not less than $500 nor more than $775. Since the evidence supports the fixing plaintiff's attorney's fee at any amount not less than $250 nor more than $775, and Mr. Bassi's testimony that Judge Pucci was willing to accept $250 was not contradicted, we cannot say that the chancellor's determination as to the amount of the fee was clearly against the manifest weight of the evidence.

It is our opinion that the cross-appeal should be denied, and that the decree of the circuit court of Marshall County should be, and it is hereby, affirmed.

Affirmed.

SMITH, P.J., and DOVE, J., concur.

tendered the amount due on the foreclosure, judge would award [illegible]
he would assess $[illegible] for his services. [illegible]
chancellor fixed judge [illegible]'s fee at $[illegible]. [illegible]
that this fee should have been fixed in [illegible]
nor more than $[illegible]. Since the evidence [illegible]
attorney's fee at [illegible]
and Mr. Hasell's [illegible]
was not contradicted, we cannot [illegible]
as to the amount of the fee [illegible]
the evidence.

It is our opinion [illegible]
and that the decree of the circuit court [illegible]
be, and it is hereby, affirmed.

Affirmed.

SMITH, J.D., and [illegible], C.J., concur.

General No. 11497 (Abstract Only) Agenda 3

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT
(Second Division)

MAY TERM, A.D. 1961

IN THE MATTER OF THE ESTATE OF GERTRUDE E. ESTEE, Incompetent	Appeal from the Probate Court of Kane County.
MARIAN M. DOANE, Petitioner, Plaintiff-Appellant, vs. GERTRUDE E. ESTEE and J. E. BRUNNEMEYER, Guardian ad Litem for Gertrude E. Estee, Defendants-Appellees.	

SPIVEY-- P. J.

This is an appeal from an order of the Probate Court of Kane County, Illinois, which order was dated October 18, 1960. The order denied a petition for the appointment of a conservator for Gertrude E. Estee, and Marian M. Doane was directed to return assets to Gertrude E. Estee which Marian M. Doane held by virtue of an appointment as Mrs. Estee's conservator on September 7, 1960. The order of appointment of September 7, 1960 was vacated on September 15, 1960.

On September 1, 1960, Marian M. Doane filed her petition pursuant to Section 115 of the Probate Act, Chap. 3, Sect. 267, Ill. Rev. Stat. 1959, for the appointment of a conservator for Gertrude E. Estee. Marian Doane is a niece and the only relative living in the immediate locality of Gertrude Estee.

(Abstract Only)

SYNOPSIS

Hare County, Filed July [illegible] 1960 [illegible] order denied a petition [illegible] Gertrude L. Reese, [illegible] to Gertrude L. Reese which [illegible] appointment as [illegible] order of appointment of [illegible] 15, 1960.

On September 1, 1960, Marian R. Reese filed her petition pursuant to Section 115 of the Probate Act, Chap. 3, Sec. 115, Ill. Rev. Stat. 1959, for the appointment of a conservator for Gertrude E. Reese. Marian Reese is a niece and the only relative living in the immediate locality of Gertrude Reese.

The petition alleged that Mrs. Estee was incapable of managing her person or estate because of imperfection and deterioration of mentality, and that the value of the incompetent's personal estate was $100,000, and the value of the real estate was $10,000.

Attached thereto was the affidavit of William G. Eilert, M.D. The affidavit stated that he had practiced medicine in Aurora, Illinois, since 1936, and that he trained at Northwestern University and had general experience in surgery and psychiatric care of aged patients. He stated that he had attended Gertrude E. Estee since 1948 as a family physician, and saw her frequently, professionally. In the affidavit in support of the petition, Eilert stated that he had made an examination on August 12, 1960, and found Mrs. Estee physically in fair health except for osteoarthritis. However, mentally she evidenced marked forgetfulness, impaired judgment, and hallucinations that her long deceased husband had just left the house and was bringing an undesirable guest to dinner. He found some disorientation as to time; and stated that, in his opinion, Mrs. Gertrude Estee was incapable of managing her estate and was incompetent, and that the Court should appoint a conservator of the estate and person of Mrs. Estee.

Thereafter, summons was issued and service had, and a hearing held on September 6. On September 7, the Probate Court of Kane County appointed Marian Doane her conservator. Following the appointment, Mrs. Doane duly qualified.

On September 13 a hearing was held relative to the petition of Mrs. Estee for revocation of the letters of conservatorship under Section 128 of the Probate Act, Chap. 3, Sect. 280, Ill. Rev. Stat. 1959. The court appointed J. E. Brunnemeyer Guardian ad Litem for Mrs. Estee over the objection of the conservator that, as Attorney-in-Fact for Gertrude Estee, J. E. Brunnemeyer was an interested party to the proceeding.

The petition alleged that Mrs. Hayes was incapable of managing her person or estate because of imperfection and deterioration of mentality, and that the value of the incompetent's personal estate was $100,000; and the value of the real estate was $10,000.

Associate Shorts was the attorney of record, William, M.D. The affidavit states that he has practiced medicine in Illinois, since 1916, and that he treated Mrs. Hayes [illegible] and had general experience in nervous and psychiatric cases [illegible] patients. He stated that he had treated Mrs. Hayes since 1926 as a family physician, and saw her frequently, practically daily. In the affidavit in support of the petition, [illegible] stated that he had made an examination [illegible], and [illegible] physically in fair health [illegible]. However, mentally she exhibited marked [illegible], impairment [illegible], and hallucinations that [illegible] in the house and was bringing in undesirable [illegible]. He found some disorientation as to [illegible], and, in his opinion, Mrs. Gertrude Hayes was incapable of managing her person and was incompetent, and that the Court should appoint a conservator of the estate and person of Mrs. Hayes.

Thereafter, summons was issued and served, and a hearing had on September 6. On September 7, the Probate Court of Kane County appointed Marian Hayes her conservator. Following the appointment, Mrs. Hayes duly qualified.

On September 13 a hearing was held relative to the petition of Mrs. Hayes for revocation of the letters of conservatorship under Section 121 of the Probate Act, Chap. 3, Sec. 280, Ill. Rev. Stat. 1939. The court appointed L. E. Brunemeyer guardian ad litem for Mrs. Hayes over the objection of the conservator that, as Attorney-in-fact for Gertrude Hayes, L. E. Brunemeyer was an interested party to the proceeding.

Various other proceedings were had, not necessary for consideration herein, all of which caused the Court, on September 15, to enter an order vacating the order appointing Mrs. Doane.

On October 4, 1960, the hearing was held on the original petition of Marian Doane for the appointment of a conservator. On October 18, 1960, the court entered an order nunc pro tunc as of October 14, 1960, denying the petition and directing that Mrs. Estee's assets be returned to Mrs. Estee upon her paying fees of the Guardian ad Litem, Marian Doane and Attorney Richard C. Hamper (attorney for Marian Doane).

We feel that a rather detailed recitation of the evidence is required. As abstracted, the evidence discloses the following:

Mrs. Doane testified that Mrs. Estee was her only living relative. Mrs. Estee had a niece living in Oregon and two other nieces, whose addresses were unknown. Mrs. Doane stated that she had lived next door to Mrs. Estee for twenty years under a wonderful relationship, which continued until two weeks ago. In October, 1959, Mrs. Estee started calling Mr. Brunnemeyer and herself about her mother-in-law and husband, who were dead, and felt that they were back with her. Mrs. Doane discussed this with Mr. Brunnemeyer and, as a result, hired a Mrs. Stapleton to live with Mrs. Estee. Mrs. Stapleton fell in April or May, 1960, and thereafter was physically unable to live with Mrs. Estee. At that time Mrs. Estee called Mrs. Doane and stated that Mrs. Estee's husband was back with her and a couple was living upstairs in her home. These conversations with Mrs. Estee started in the morning and continued off and on until night time. Mrs. Doane conferred with Mr. Brunnemeyer and, as a result, a Mrs. Farnsworth and a Mrs. Harris were engaged to live with Mrs. Estee. Mrs. Doane has lived in Geneva two years and has seen Mrs. Estee once or twice

Various other proceedings were [illegible], not necessary to [illegible] consideration herein, all of which [illegible] 15, to enter an order [illegible] [illegible].

On October [illegible], [illegible] position of [illegible] [illegible]. On October 16, 1[illegible], [illegible] of October 16, [illegible]. Babee's [illegible] the guardian ad litem, [illegible] (attorney for [illegible]).

[illegible] is required. [illegible] relative. [illegible] nieces, [illegible] she had lived [illegible]. [illegible] wonderful [illegible], [illegible] October, [illegible] [illegible] said about her [illegible], [illegible] that they were [illegible]. [illegible] Birmingham [illegible], as a result, [illegible] bra. Babee. [illegible] [illegible], and thereafter was physically [illegible] [illegible] that like her. Babee [illegible]. [illegible] Babee's husband was [illegible] in her home. These conversations with [illegible] [illegible] in the morning and continued all and or most of the [illegible]. [illegible] conferred with Mr. [illegible], as a result, [illegible] and a [illegible]. Harris were [illegible] to live with [illegible] Babee. [illegible] has lived in Geneva two years and has been [illegible]. Babee [illegible]

a week during that time. Mrs. Estee told Mrs. Doane that Mr. Brunnemeyer made out checks for her and took care of her affairs. Mrs. Estee loaned the witness $3,000 on a five-year note at 5%, and Mrs. Doane had paid the interest. Mrs. Doane's daughter borrowed $1,000 from Mrs. Estee, which had been repaid, and Mrs. Estee loaned $2,000 to Mrs. Doane's son when he was building a home.

On cross-examination she testified that she is employed full time in the Aurora School District and has had training in the field of investments as conservator of her mother's estate and in managing property which she individually owned. She had consulted with Mr. Brunnemeyer at his office, accompanied by Mr.. Hamper, at which time Mr. Brunnemeyer said, "The Bank will handle the estate and get a conservator."

Dr. Eilert testified that he had examined Mrs. Estee on August 12 and September 8 and had then executed affidavits as to her condition following such examinations. He stated that during the past year, she was for her age in good physical health and had been up to a period during the year in good mental health. About June she told him of hallucinations about her deceased husband and mother-in-law. At the time she had blood pressure higher than normal. There were periods when her hallucinations would occur, but between those periods there would be no signs of disorder. At the time of the hallucnations she was extremely uneasy and deceased relatives became real to her and she reacted to these conditions as though they were alive and was motivated by them, and at these times she was disoriented in regard to time. The hallucinations happened several times and would, in his opinion, become worse; during these periods she would not be capable of good judgment and the managing of her own affairs. Dr. Eilert stated

a week during that time. Yet, [illegible] for [illegible]
[illegible] made out checks for her and [illegible]
Mrs. [illegible] on a [illegible]
and Mrs. [illegible]
borrowed $1,000 [illegible]
[illegible] $2,000 to [illegible]
[illegible]

[illegible]
[illegible] time [illegible]
the [illegible]
in [illegible]
[illegible]
Harper, [illegible]
the [illegible]

[illegible]
on August 12 [illegible]
as to her [illegible]
during [illegible]
and had been [illegible]
About [illegible]
land and [illegible]
than normal. [illegible]
occur, but [illegible]
order. [illegible]
and decreased relative [illegible]
conditions as though they were alive and [illegible]
at times she was disoriented in [illegible]
inactions happened several times [illegible]
worse; during these periods she [illegible]
judgment and the handling of her own affairs. Dr. Eileen [illegible]

that in his opinion, Mrs. Estee was competent when not in these unpredictable periods of hallucinations, but that during periods of hallucinations, she was not. He believed that she should not be left alone and he had recommended nursing care, and Rose Farnsworth and Pauline Harris were employed to care for her. He signed an affidavit in his office, at which time Mr. Hamper and Mrs. Doane were present. He examined Mrs. Estee on September 8, but his statement was a result of previous examinations dating from a request by Mr. Brunnemeyer that he see Mrs. Estee. He testified that on September 8, 1960, she was free of delusions and was competent. He further stated that, if she had someone living with her that she liked, it would be a great help. Her blood pressure had something to do with her condition but it wasn't as much as solitude. He saw Mrs. Estee at two-week or ten-day intervals from June, and he had observed during those visitations that she had misplaced medicine and didn't know whether she had taken it or not. On one occasion she lost her keys and was preparing a meal for her deceased husband. He was given checks at the end of the month for his services signed by Mrs. Estee.

Mrs. Estee was called under Section 60 of the Practice Act. She stated that she is 85 years old and had lived at 420 Walnut Street for many years. She was unable to state whether she owned any property now, but said she owned the property she lived in. She had not looked into whether she owned a farm but should have inherited one. She said she owned stocks and bonds and owned no other property. Then she indicated she had an account in the First National Bank of Aurora (a bank not in business since 1936). Mrs. Estee testified that she had owned some diamonds which she lost within the past two years. She admitted that she had hallucinations for awhile right after her husband and his mother died

that in his opinion, Mrs. Bates was competent when not in these unpredictable periods of hallucinations, but that during periods of hallucinations, she was not. He believed that she should not be left alone and he had recommended nursing care, and those Farnsworth and Pauline Harris were employed to care for her. He signed an affidavit to this effect, a copy of which she [illegible]. Harper and Mrs. Downs were present. He examined her [illegible] on September 2, but his statement was a result of previous examinations during her a request by Mr. Brownmeyer that he see Mrs. Bates. He testified that on September 3, 1950, she was free of hallucinations and competent. He further stated that, if she had been living with her that she liked, it would be a great loss. Her [illegible] presence had something to do with her [illegible] but it would be [illegible] tude. He saw Mrs. Bates at two-week or two-day intervals from June, and he had observed during these examinations that she had misplaced medicine and didn't know whether she had taken it or not. On one occasion she left her [illegible] and was preparing a meal for her deceased husband. He was given [illegible] at the end of the month for his services [illegible].

Mrs. Bates was called under Section 60 of the Probate Act. She stated that she is [illegible] years old and has lived at 420 Walnut Street for many years. She was unable to state whether she owned any property now, but said she owned the property she lived in. She had not looked into whether she owned a farm but should have inherited one. She said she owned stocks and bonds and owned no other property. Then she indicated she had an account in the First National Bank of Aurora (a bank not in business since 1936). Mrs. Bates testified that she had owned some diamonds which she lost within the past two years. She admitted that she had hallucinations for awhile right after her husband and his mother died.

and said that she would be more likely to have them under those conditions. She did not know or recognize her attorney, Donald Puckett, and never had talked to him. She claimed that she had known Mr. Brunnemeyer for a long time but said she did all of her business affairs herself and did not remember his helping her make out checks. She asserted she knew what a power-of-attorney was but never had executed one. The witness alleged that she had a will but refused to tell the Court where it was, and stated that she had been in court once before within a month, but had no recollection why she was there.

Rose Farnsworth testified that she was a licensed nurse and had been employed by Mr. Brunnemeyer to care for Mrs. Estee for a period of five or six weeks. During this time Mrs. Farnsworth prepared breakfast and rendered personal care to Mrs. Estee. Mrs. Farnsworth ordered groceries, took Mrs. Estee to the foot doctor and dentist, and shopped for her. When they went to the bakery, Mrs. Estee wanted twelve rolls because of the "men folks". Mrs. Farnsworth testified that when taking a cab, Mrs. Estee paid the driver but would again try to pay the witness after returning home and then would try to pay her again fifteen minutes later. Her employment was terminated by Mr. Brunnemeyer on September 16, 1960. Mrs. Estee at times seemed rational and then would have hallucinations about her husband. The witness said Mrs. Estee was always losing things and became panicky because she couldn't find them, and that she couldn't find her diamonds. Mrs. Estee ordered extra locks for the doors because she thought her deceased brother was coming. Mrs. Estee could tell the year but not the day of the month. The witness saw Mrs. Estee make out one check and she saw Mr. Brunnemeyer make out other checks in Mrs. Estee's behalf. Mrs. Estee had nothing to do with terminating her employment. The witness did not feel Mrs. Estee was capable of managing

[illegible]

her affairs and she had formed that opinion a week or so after commencing her employment.

Pauline Harris testified that she was employed from August 12 until September 16, when she was discharged by Mr. Brunnemeyer. She took care of Mrs. Estee at night if Mrs. Estee couldn't sleep and got up and wandered around. Mrs. Estee was said to be afraid of someone breaking in, was fearful of the dark, and would close windows and doors on the hottest days and nights. The witness stated that Mrs. Estee had hallucinations and was very forgetful. One evening Mrs. Estee made the bed for her brother and stated she did not want to disturb Mr. Estee. The witness then stated that both of those persons were deceased. At times Mrs. Estee was mentally upset and far into the night discussed that her deceased brother was coming in and hiding her keys and stated that he was spending his money and not hers. She mentioned losing her diamonds. In the opinion of Pauline Harris, Mrs. Estee was not capable of managing her own affairs without help.

On cross-examination, she stated there was an occasion when Mrs. Estee was very badly upset in regard to money that was being paid the witness. The witness said she was paid $1.25 per hour, and Mrs. Farnsworth received $1.75 per hour, and Mrs. Estee liked the witness and Mrs. Farnsworth.

The testimony on behalf of Mrs. Estee was that of Dr. Bernard E. Moisant and J. E. Brunnemeyer.

Dr. Moisant, after relating his connection with St. Charles, St. Joseph and Copley Hospitals in Aurora, and general supervision of Mercyville Sanitarium, testified that he had examined Mrs. Estee on September 16. He stated that her blood pressure was normal, she was in generally good physical condition for her age, well dressed and well groomed, and that her memory was a little cloudy and slow. The doctor stated Mrs. Estee told

her affairs and she had issued that opinion a week or so after commencing her employment.

Pauline Harris testified that she was employed from August 12 until September 14, when she was discharged by Mr. Farnsworth. She took care of Mrs. Bates during the daytime, helped her with her meals, dressed her, helped her comfort's sake, and took up and massaged her. She also said to be afraid of screaming during the night, and further that she and would close windows and bar doors when leaving the house. The windows started with her. Mrs. Bates had hallucinations and was forgetful. She [illegible] stated she did not want to disturb Mr. Bates. The witness also stated that both of them [illegible] were [illegible]. Mrs. Bates was normally quiet [illegible] her deceased brother was [illegible] that he was speaking his body and [illegible]. [illegible] her dementia. In the opinion of [illegible], Mrs. Bates was incapable of managing her own affairs without help.

On cross-examination, the witness [illegible] when Mrs. Bates was very [illegible] in regard to money, and was being paid the witness. The witness [illegible] $[illegible] per hour, and Mr. Farnsworth paid $[illegible] per hour, and Mr. [illegible] liked the witness and Mr. Farnsworth.

The testimony on behalf [illegible] Mrs. Bates was that of Dr. Bernard E. Holsant and J. E. Farnsworth.

Dr. Holsant, after relating his connection with St. Charles, St. Joseph and Cuyler Hospitals in Aurora, and general supervision of Mercyville Sanitarium, testified that he had examined Mrs. Bates on September 16. He stated that her blood pressure was normal, she was in generally good physical condition for her age, well dressed and well groomed, and that her memory was a little slowly and slow. The doctor stated Mrs. Bates told

him of the problem of her hallucinations. He testified that she had some arthritis and was feeble, but his opinion was that she definitely was competent at the time of his examination.

On cross-examination he stated he had seen Mrs. Estee only on September 16 and that prior to that time Mr. Puckett had called him and acquainted him with the fact that she had hallucinations, and that Mrs. Estee told him of visual and oral impressions of hallucinations. When one is undergoing hallucinations, he stated, it is quite possible that they would be disoriented; and it is also possible, but not probable, that while suffering from an hallucination one could carry on normal business and be competent.

J. E. Brunnemeyer testified that he had been attorney for Mrs. Estee for a number of years. He identified Guardian ad Litem's Exhibit No. 2, being a general power of attorney given him by Mrs. Estee dated October 1, 1959, authorizing him to transact all of her business affairs as attorney-in-fact. He stated he saw Mrs. Estee at least once a week during the preceding year and had received numerous phone calls from her about her business matters, and that during the month of August, she called him constantly for any assistance she needed. He hired two nurses at the request of Mrs. Doane. Mrs. Estee's condition warranted someone being with her, and he did this under the power-of-attorney plus Mrs. Estee's O. K., he said. He filled out checks, computing the amounts for nurses hired and Mrs. Estee kept her own books accurately. He checked the check stubs and found no mismanagement by her of any of her affairs. He was advised by Mrs. Estee of three personal loans to her niece's family and a loan to Mrs. Farnsworth, which he advised was not proper. In his opinion, Mrs. Estee was capable of managing her own property, with the limitation that she needed around-the-clock companionship and with a qualification that she has the assistance of himself or someone else under a power-of-attorney. He did not think hallucinations would interfere with the handling of her property.

bis of the problem of her hallucinations. He testified that she had some attacks and was feeble, but his opinion was that she definitely was competent at the time of his examination.

On cross-examination [illegible] only on September 15 and that prior to that time Dr. [illegible] called him and complained [illegible] actions, and that Mrs. Estes [illegible] of hallucinations. [illegible] stated, it is also possible that [illegible] it is also possible, [illegible] an hallucination one [illegible]

[illegible] for Mrs. Estes for a number of years. [illegible] Moon's exhibit no. [illegible] by Mrs. Estes dated October [illegible] all of her business affairs [illegible] Mrs. Estes at least once a week [illegible] received numerous [illegible] and that during the month of March, [illegible] any assistance [illegible] Mrs. Doane. Mrs. Estes's [illegible] her, and he did this under [illegible] power-of-attorney [illegible] C. R., he said. [illegible] nurses hired and Mrs. Estes kept [illegible] checked the check stubs and found no [illegible] of any of her affairs. He was advised by Mrs. Estes of three personal loans to her niece's family and a loan to Mrs. [illegible], which he advised was not proper. In his opinion, Mrs. Estes was capable of managing her own property, with the limitation that she needed around-the-clock companionship and with a qualification that she has the assistance of himself or someone else under a power-of-attorney. He did not think hallucinations would interfere with the handling of her property.

On cross-examination he stated that, due to the frequent calls from Mrs. Estee, he called Mrs. Doane for assistance in finding someone to take care of Mrs. Estee. He was told by Mrs. Estee that she had called the Aurora police to find her deceased mother-in-law, who was running around outside.

At this point in the testimony, Mrs. Estee, from the counsel's table, interposed this statement, "That was the time she went out in the rain and I was afraid she would catch cold."

He stated Mrs. Estee had discussed the problem of her hallucinations with him; and, it was questionable in his opinion that she was capable of handling her own affairs when experiencing an hallucination.

A proceeding to appoint a conservator is an inquisition by public authorities on behalf of the public, and no one is wholly a stranger to the proceeding. People vs. Jansen, 263 Ill. App. 101.

In Dodge vs. Cole et al., 97 Ill. 338, the Supreme Court stated: "That by the common law of England, as it existed prior to the fourth year of the reign of James the First, the power and control over the persons and the property of lunatics and idiots belonged to the King, as parens patriae, and were exercised by him through the Lord Chancellor. That although this jurisdiction was exercised by the Lord Chancellor in the High Court of Chancery, yet it was not exercised by him in his character of Chancellor, or by virtue of the general power obtaining to that court, but, on the contrary, by virtue of a separate and distinct commission under the signed manual from the Crown. That upon the organization of our State government, the State, as a political sovereignty, in its character of parens patriae succeeded to all the rights and duties previously enjoyed or exercised by the Crown of England with respect to idiots and lunatics and their estates."

On cross-examination he stated that, due to the frequent calls from Mrs. Hates, he called Mrs. Jones for assistance in finding someone to take care of Mrs. Hates. He was told by Mrs. Hates that she had called the Akron police to land her deceased mother-in-law, who was running around the lot.

At this point in the testimony, Mrs. Hates, from the counsel's table, interposed this statement, "That was the time she went out in the rain and I was afraid she would catch cold."

He stated Mrs. Jones had mentioned the problem of her hallucinations with him; and, it was particularly in his opinion that she was capable of handling her own affairs with experiencing an hallucination.

A proceeding to appoint a conservator is an inquisition by public authorities on behalf of the public, and no one is really a stranger to the proceeding. People vs. Jansen, 26, Ill. App. 101.

In People vs. Cole et al., 97 Ill. 2d 1, the supreme Court stated: "That by the common law of England, as it existed prior to the fourth year of the reign of James the First, the power and control over the persons and the property of lunatics and idiots belonged to the King, as parens patriae, and were exercised by him through the Lord Chancellor. That although the jurisdiction was exercised by the Lord Chancellor in the High Court of Chancery, yet it was not exercised by him in his character of Chancellor, or by virtue of the general power obtaining in that court, but, on the contrary, by virtue of a separate and distinct commission under the signed manual from the Crown. That upon the organization of our State government, the State, as a political sovereignty, in its character of parens patriae succeeded to all the rights and duties previously enjoyed or exercised by the Crown of England with respect to idiots and lunatics and their estates."

"The test which is universally applied in determining judicially whether a conservator should be appointed is whether the person is capable of managing his own affairs." MacDonald vs. LaSalle National Bank, et al., 11 Ill. 2d. 122, 142 N.E. 2d. 58, and cases cited thereunder.

To manage ones own person or estate involves the mental capacity to transact ordinary business affairs of life. In discussing this element of mental capacity, the Supreme Court, in Coleman vs. Marshall, et al., 263 Ill. 330, 104 N.E. 1042, quoting from Ring vs. Lawless, 190 Ill. 520, 60 N.E. 881, states: "In the ordinary business transactions of life a person must have mental strength and understanding to compete with an antagonist and protect his own interests. Such transactions involve a contest of reason, judgment, experience and the exercise of mental powers not necessary to the testamentary disposition of property." The Court further recognizes the rule that a higher degree of mentality is necessary to make a valid deed than is required to make a valid will.

The extent of legal inquiry where insanity or mental incapacity is alleged varies, depending upon the object and purpose for which insanity is to be proved in each case. In one case it may be a defense to a criminal case; in another, the execution of a will; in another, whether the person shall be deprived of his liberty and confined in an asylum; and, still another, the question may be whether a conservator should be appointed to take charge of the person or estate, or both. What may be regarded insanity or mental incapacity in one case would not necessarily mean insanity in another. No definite rule can be laid down which will apply to all cases. Snyder vs. Snyder, 142 Ill. 60, 31 N.E. 303.

"The test which is universally applied in determining judicially whether a conservator should be appointed is whether the person is capable of managing his own affairs." Mechanicsville vs. Lasalle National Bank, et al., 11 Ill. App. 127, 131 [illegible], and cases cited therewith.

To restore unto one's control or liberty involves the mental capacity to transact ordinary business affairs of life. In discussing this element of mental capacity, [illegible] Coleman vs. Kimball, et al., [illegible] Ill. 320, 84 N.E. 1024, [illegible] from Ill. vs. Lawless, 140 Ill. 270, [illegible] "In the ordinary business transaction [illegible] have [illegible] strength and wakefulness to compare with an avid world and protect his own interests. Upon transactions involve a contract or reason, judgment, experience or [illegible] in relation to [illegible] necessary to the testamentary disposition of property." The Court further recognizes the rule that a [illegible] degree of capacity is necessary to make a valid deed than is required to make a valid will.

The extent of legal insanity whether insanity or mental incapacity is alleged varies, according to the objects and purposes for which insanity is to be proven in each case. In one case it may be a defense to a criminal case; in another, the execution of a will; in another, whether the person shall be deprived of his liberty and confined in an asylum; and, still another, the question may be whether a conservator should be appointed to take charge of the person or estate, or both. What may be regarded insanity or mental incapacity in one case would not necessarily mean insanity in another. No definite rule can be laid down which will apply to all cases. Burder vs. Snyder, 142 Ill. 60, 31 N.E. 303.

In Estate of Johnson vs. Kilpatrick, 250 Ill. App. 416, the Court quoted with approval from Parcher vs. Reese, 202 Ill. App. 509, as follows: "Lunacy laws are enacted for the benefit of the unfortunate as well as the public. * * * They are in their nature emergency laws and must operate, if they operate at all, when the emergency arises. Such laws should be construed liberally to the end that their purpose may be effectuated. If courts stick in the bark on technical questions of construction of terms, the lunatic may destroy himself or others or waste or lose his property, and the object of the law thereby be frustrated while hairs are split."

The evidence in this case is not seriously in dispute. Mrs. Estee in her own testimony reflected a total lack on consciousness, memory or understanding of her estate and holdings. She had lost or misplaced her diamonds; she knew what a power-of-attorney was but "had never executed one," although part of this record shows that she had on October 1, 1959, less than a year before the hearing of this case, executed a power-of-attorney to Mr. Brunnemeyer. (Guardian ad Litem's Exhibit No. 2). It will serve no useful purpose to lengthen this opinion by again repeating the evidence already stated in this opinion.

We are impressed by the uncertainty of the mental capacity of Mrs. Estee to manage her person or estate as disclosed by the questions and discussion with Mrs. Estee when she was sworn as a witness and testified.

Counsel for the defendant makes the contention that there is a difference, as we understand it, between virulent hallucinations and non-virulent hallucinations. Citing Forster, Executor, vs. Dickerson, 24 Atlantic 253. In that case each of the doctors

used the word "hallucination" and this, indeed, would be in a medical sense. Dorland's Medical Dictionary, 23rd Edition (1957), defines hallucination as "a sense perception not founded upon objective reality." Auditory hallucinations: "The hearing of unreal sounds." Visual hallucinations: "A sense of seeing, not stimulated by actual presence of the object seen."

The same author defines "delusions" as follows: "A false belief which cannot be corrected by reason. It is not logically founded and cannot be corrected by argument or persuasion or even by the patient's own senses." The cited authority apparently has nothing whatever to do with the use by a doctor of the word. The problem therein discussed was the use of the word by a layman in a letter and the Court allowed the witness to explain her meaning. This would not be of any assistance in determining the use of the word by doctors of medicine.

It is further contended that these are isolated incidents of hallucinations. Mrs. Estee's doctor for some years (beginning some time prior to the year 1950) attached his affidavit to the petition of Mrs. Doane. He testified, in response to the question, "What would your prognosis be of her future condition? Would you expect as a doctor that it would be progressively worse or better?" That "These are fruits of old age and they are going to become progressively worse."

At the time of the hearing it is clearly apparent that Mrs. Estee was suffering from hallucinations. While Mr. Brunnemeyer was testifying and relating one of the incidents of an hallucination that he had personal knowledge of, Mrs. Estee, without any question being directed to her, interposed the state-

used the word "hallucination" and this, indeed, would be in a medical sense. Dorland's Medical Dictionary, 23rd Edition (1957), defines hallucination as "a sense perception not founded upon objective reality." Auditory hallucinations: "The hearing of unreal sounds." Visual hallucinations: "A sense of seeing, not stimulated by actual presence of the object seen."

The same author defines "delusions" as follows:

"A false belief which cannot be corrected by reason. It is not logically founded and cannot be corrected by arguments or persuasion or even by the patient's own senses." The cited authority apparently has nothing whatever to do with the use by a doctor of the word. The problem therein introduced was the use of the word by a layman in a letter and the Court allowed the witness to explain her meaning. This would not be of any assistance in determining the use of the word by doctors of medicine.

It is further contended that there are isolated incidents of hallucinations. Mrs. Farrell's doctor for some years (beginning some time prior to the year 1950) attached his affidavit to the petition of Mrs. Deane. He testified, in response to the question, "What would your prognosis be of her future condition? Would you expect as a doctor that it would be progressively worse or better?" That "These are fruits of old age and they are going to become progressively worse."

At the time of the hearing it is clearly apparent that Mrs. Estee was suffering from hallucinations. While Mr. Drumgoyer was testifying and relating one of the incidents of an hallucination that he had personal knowledge of, Mrs. Estee, without any question being directed to her, interposed the state-

ment: "That was the time she went out in the rain and I was afraid she would catch cold."

The decision of the trial court was against the manifest weight of the evidence.

Mrs. Doane filed this petition alleging as grounds therefor that Mrs. Estee "is wholly incapable of managing her estate and is incompetent in that: She is incapable of managing her person or estate because of imperfection and deterioration of mentality." This allegation is in the exact language of part of Sect. 264, Ill. Rev. Stat. 1959, defining an incompetent.

The order of the Probate Court of Kane County is reversed and remanded with directions to enter an order appointing a conservator for Gertrude E. Estee in accordance with law.

Reversed and remanded
with directions.

Crow, J., and Wright, J., concur.

ment: "That was the time she went out in the rain and I was afraid she would catch cold."

The decision of the trial court was against the manifest weight of the evidence.

Mrs. Dorne filed this petition praying as grounds therefor that Mrs. Dorne is wholly incapable of managing her estate and is incompetent in fact. She is incapable of managing her person or estate because of mental decline and deterioration of mentality." This allegation is in the exact language of sect. 2(d), ill. Rev. Stat. 1951, defining an incompetent.

The order of the Probate Court of Cook County is reversed and remanded with directions to enter an order appointing a conservator for Dorothy J. Dorne in accordance with law.

Reversed and remanded with directions.

Crow, J., and Wright, J., concur.

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KJC

2nd DIVISION

Abstract

No. 11507 Publish Abstract Only Agenda 4

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT., SECOND DIVISION

MAY TERM, A. D. 1961

FILED
SEP 19 1961
PAUL V. WUNDER
Clerk Appellate Court Second District

In the Matter of the Estate of GEORGE H. LUXTON, Deceased. RALPH E. LUXTON, Plaintiff-Appellee, vs. EDWIN A. LOOP, as guardian ad litem for Estate of GEORGE H. LUXTON, Deceased and ALICE LUXTON, Defendants, Appeal of ALICE LUXTON, Certain Defendant-Appellant.	Appeal from the County Court of Boone County.

WRIGHT -- J.

This is an appeal from an order of the County Court of Boone County allowing the claim of Ralph E. Luxton in the sum of $6,145.88 against the estate of George H. Luxton, deceased. The claimant, Ralph E. Luxton, was the son of the decedent and also executor of his estate. A guardian ad litem

Abstract

No. 11,507 Bond for Deceased Guy

In the

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT, TERM 1951

JAN TERM, A. D. 1951

In the Matter of the Estate of
GEORGE H. LINTON, Deceased.
HALLY C. LINTON,

Plaintiff-Appellee,

vs.

LORIN A. LOGAN, as guardian ad litem
for Estate of GEORGE H. LINTON,
Deceased and ALICE LINTON,

Defendants.

Appeal of
ALICE LINTON,

Defendant-Appellant.)

Appeal from
the County
Court of
Lake County.

MEMORANDUM — 1.

This is an appeal from an order of the County Court of Lake County allowing the claim of Hally C. Linton in the sum of $6,141.60 against the estate of George H. Linton, deceased. The claimant, Hally C. Linton, was the son of the decedent and also executor of his estate. A guardian ad litem

was appointed to defend the claim and the claim was also opposed by the decedent's widow, Alice Luxton. Alice Luxton, who was also a devisee and legatee under her husband's will, takes this appeal from an order of the County Court allowing the claim.

The claim of Ralph E. Luxton was filed May 24, 1960, and recites that the estate of George Luxton is indebted to Ralph E. Luxton in the amount of $6,145.88 on a judgment note dated October 14, 1945, in the principal sum of $5,000.00 due and payable five years from date, with interest at the rate of 5% per annum, which bears endorsement of interest paid to October 14, 1955, leaving a balance due as of May 14, 1960, of $5,000.00 on principal and interest in the amount of $1,145.88. Attached to the claim is a copy of the note described in the claim.

George Luxton died January 6, 1960, leaving an estate in Illinois consisting of $27,500.00 in real estate and $22,985.00 in personal property in addition to certain property in California. He was survived by his widow, Alice Luxton, and his three sons, Ralph E. Luxton, Robert Luxton and Earl Luxton. By his will, he left his widow her statutory share of his estate and the remainder in equal parts to his three sons.

The claimant, his brother, Robert Luxton, and his uncle,

[illegible] applicants to defend his claim and the [illegible] was also opposed by the decedent's widow, Alice Lawson. Alice [illegible], who was also a decedent and legatee under her husband's will, [illegible] only proved Iowa as under [illegible] claim.

The claim of Ruby [illegible] Lawson [illegible] contains the [illegible] that the estate of George Lawson [illegible] Lawson in the amount of [illegible] on a [illegible] October 14, 1945, in the principal sum of [illegible] and payable five years from date, with interest at the rate of 5% per annum, which bears [illegible] of interest and to October 14, 1948, leaving a balance due as of [illegible], 1950, of $3,[illegible].00 on principal and interest in the amount of $1,[illegible]. Attached to the claim is a copy of the note described in the claim.

George Lawson died January [illegible], 1950, leaving an estate in Illinois consisting of $[illegible].00 in real estate and $22,[illegible].00 in personal property in addition to certain property in California. He was survived by his widow, Alice Lawson, and his three sons, Ralph L. Lawson, Robert Lawson and Karl Lawson. By his will, he left his widow her statutory share of his estate and the remainder is equal parts to his three sons.

The claimant, his brother, Robert Lawson, and his uncle,

Ernest Luxton, testified in the County Court in support of the claim. Neither the guardian ad litem or decedent's widow filed any pleadings to the claim nor did either offer any evidence in opposition thereto.

The decedent, during his lifetime, operated a business establishment referred to as the Rainbow Gardens near Belvidere, Illinois, from 1924 until 1945. His business consisted of a hamburger stand, picnic grove, gas station and dance hall. Ralph E. Luxton, the claimant, lived and worked at Rainbow Gardens with his father from 1927 until his father sold the business in 1945. The claimant's brother, Robert Luxton, worked at Rainbow Gardens from 1930 until 1935. There is no evidence that the third son, Earl Luxton, ever worked at Rainbow Gardens. Robert Luxton moved to California in 1935 and lived there at the time of the hearing in this case.

Robert Luxton testified concerning four separate conversations that he had with his father, two of which related to compensation to be paid him and his brother, Ralph, for work performed at Rainbow Gardens, and two relative to the judgment note in dispute. He further testified that in October of 1929 he had a conversation with his father, in the presence of the claimant, and that his father stated, "It has been a rough night, boys, and I promise you that you will be paid

Robert Lawson, testifying in the county court as supporter of the claim. Neither the guardian ad litem or defendant's widow called any witnesses to the claim nor did either offer any evidence in opposition thereto.

The decedent, during his lifetime, operated a business establishment referred to as the Rainbow Gardens near Hainesville, Illinois, from 1921 until 1943. His business consisted of a refreshment stand, pinball games, gas station and dance hall. Ralph S. Lawson, the claimant, lived and worked at Rainbow Gardens with his father from 1921 until the father sold the business in 1943. The claimant's brother, Robert Lawson, worked at Rainbow Gardens from 1929 until 1931. There is no evidence that the third son, Earl Lawson, ever worked at Rainbow Gardens. Robert Lawson moved to California in 1933 and lived there at the time of the hearing in this case.

Robert Lawson testified concerning four separate conversations each he had with his father, two of which related to compensation to be paid him and his brother, Ralph, for work performed at Rainbow Gardens, and two relative to the judgment note in dispute. He further testified that in October of 1929 he had a conversation with his father, in the presence of the claimant, and that his father stated, "It has been a rough night, boys, and I promise you that you will be paid

for your work here." He further testified that in 1932 at Rainbow Gardens, in the presence of the claimant, his father said, "I don't have much to give you now but when I do I will see that you are paid for your work here." He also testified that he had a conversation with his father in January or February of 1946 in California, at which time only the two of them were present, and that the decedent told him, "I have left a note for Ralph for $5,000.00 and one for you for $3,000.00 which is payment for the work you performed at Rainbow when I didn't have anything to give you but promises." This witness further testified that he had a conversation with his father in front of his apartment house in Inglewood, California, three or four years after the 1946 conversation, at which time his father told him there were two notes held by his brother, Ralph E. Luxton, in Belvidere, Illinois; one for $5,000.00 made payable to Ralph E. Luxton and one for $3,000.00 made payable to Robert Luxton, and his father added, "That is pay for the time you spent working at the Rainbow."

Ernest Luxton, brother of the decedent, identified the judgment note and testified that it bore the genuine signature of the decedent and that the entire written portion of the note was in the handwriting of the decedent. He further testified to a conversation that he had with the decedent in

1946 in regard to Ralph E. Luxton and Robert Luxton at which time the decedent stated, "When I get on my feet, I will take care of them."

The County Court limited the testimony of the claimant, Ralph E. Luxton, to events occurring after the death of the decedent and the claimant testified that after the death of his father that the judgment note in question was in the claimant's safety deposit box in Farmers National Bank.

The appellant, Alice Luxton, contends, (1) that the note involved was never intended by the parties to be a binding obligation but was given for the sole purpose of preferring the payee in the distribution of the estate of the decedent, (2) that there was not sufficient consideration for the note and that it was, therefore, a gift and unenforceable against the estate, (3) that the note was paid; and (4) that the trial court erred in the admission and consideration of the evidence. Appellee's theory is that the note having been attached to the claim, and no defense having been pleaded and no proof offered in opposition to the claim and the County Court having allowed the claim, the widow may not now on appeal properly raise the affirmative defenses of lack of consideration and no delivery.

Appellee vigorously contends and argues that it was mandatory upon the appellant to file written pleadings in the

1940 in regard to Ralph E. Luxton from Robert Luxton at which time the decedent stated, "When I get out of my debt, I will take care of them."

The County Court limited the testimony of the claimant, Ralph E. Luxton, to events occurring after the death of the decedent and the claimant testified that after the death of his father that the judgment note in question was in the claimant's safety deposit box in Kansas City, Missouri.

The appellant, Alice Luxton, contends, (1) that the note involved was never intended by the parties to be a binding obligation but was given for the sole purpose of preserving the payee in the distribution of the estate of the decedent, (2) that there was not sufficient consideration for the note and that it was, therefore, a gift and unenforceable against the estate, (3) that the note was paid; and (4) that the trial court erred in the admission and consideration of the evidence. Appellee's theory is that the note having been entered in the claim, and no defense having been pleaded and no proof offered in opposition to the claim and the County Court having allowed the claim, the widow may not now on appeal properly raise the affirmative defenses of lack of consideration and no delivery.

Appellee vigorously contends and argues that it was mandatory upon the appellant to file written pleadings in the

trial court alleging the affirmative defenses of lack of consideration and no delivery and not having done so cannot raise these defenses for the first time on appeal. The Illinois Probate Act (Ill. Rev. Stat., Chap. 3, Sec. 346) provides that an executor, administrator, guardian, or conservator or any other person whose rights may be affected by the allowance of a claim may file pleadings with the clerk of the court. While the language of this particular statute is not mandatory, it would seem advisable, in our opinion, to plead any proper defense. 4 James' Illinois Probate Law and Practice, Sec. 196.1, page 392. This would particularly be advisable where one asserts an affirmative defense such as denial of the execution, lack of consideration or no delivery. However, we are not required to pass upon this issue for there is ample evidence in the record to support the findings of the trial court that there was, in fact, execution, consideration and delivery of the judgment note in dispute.

Services performed or rendered to a decedent by a member of his family are viewed with suspicion, and are presumed to be rendered without any recompense. However, this presumption is rebuttable. In re Moore's Estate, 310 Ill. App. 365, 33 N. E. 2d 130. This presumption may be overcome by showing an express or implied contract for payment. Rush v. Estate of John Rush, Deceased, 27 Ill. App. 2d 242; 169 N. E.

trial court allowing the affirmative defense of lack of consideration and no delivery and no novity, then in order to state those defenses for the first time on appeal. The Illinois Pleaders Act (Ill. Rev. Stat., Chap. 2 Sec. 2-613) provides that an amendment, substitution, modification, or correction in any other pleading shall be allowed by the allowance of a claim or defense which was not set forth at the time. While the language of this provision seems to be permissive, it would seem advisable to set forth, amplifying or proper defense. 4 Jones' Illinois Pleading and Practice Sec. 1913, page 7[illegible]. This would particularly be advisable where one desires to affirmatively plead such as valid of the consideration, lack of consideration or no delivery. However, we are not required to pass upon this issue for there is ample evidence in the record to support the finding of the trial court that there was, in fact, consideration, consideration and delivery of the judgment note in dispute.

Barclays petitioned to withdraw to a decision by a member of his family are viewed with suspicion, and are presumed to be tainted without any necessary. However, this presumption is rebuttable. In re Jones's Estate, 320 Ill. App. 305, 32 N. E. 2d 1[illegible]. This presumption may be overcome by showing an express or implied contract for payment. Bush v. Estate of John Bush, Deceased, 27 Ill. App. 2d 249, 169 N. E.

2d 538, Heffron v. Brown, 155 Ill. 322, 40 N. E. 583.

We believe from the evidence in the record before us that the presumption that the services rendered were gratuitous has been more than amply overcome and rebutted by uncontradicted evidence that the decedent expressly contracted with the claimant to pay him for his services rendered at Rainbow Gardens and executed the $5,000.00 note and delivered it to claimant as evidence of the indebtedness for such services. Likewise, there is no evidence that the note was intended as a gift in the future. There is no evidence the note had been paid. The claimant worked for his father quite diligently and continuously from 1927 until 1945. The father made statements to claimant's brother in 1929, 1932, 1946 and about 1950, that he intended to pay his two sons for the services they performed and the work done at Rainbow Gardens. This was also verified by decedent's brother, Ernest Luxton, who stated that his brother told him in 1946 that he intended to take care of his two sons. It is also very significant and persuasive that the larger note was left for the son who worked the longest period, a smaller note for the son that worked a shorter period and no note for the third son who did not work with his father at Rainbow Gardens.

There is ample evidence of delivery of the note. It was in the safety deposit box of the claimant after his father's

2d 131, Goldman v. Brams, 141 Cal. 610, 75 P. 2d 526.

We believe from the evidence in the record before us that the presumption that the [illegible] services were gratuitous has been more than amply overcome and rebutted by [illegible] evidence that the decedent expected and promised the claimant to pay him for the services rendered by [illegible] and executed the $5,000.00 note and delivered it to claimant, in evidence of the indebtedness for such services. Likewise, there is no evidence that the note was intended as a gift in the future. There is no evidence the note had been paid. The claimant worked for his father more diligently and continuously from 1927 until 1940. The larger note represented an allowance to him in 1927, 1934, 1934 and about 1940, when he increased to pay his two sons for the services they performed and the work done at Rainier Gardens. This was also verified by decedent's brother, Joseph Robert, who stated that his brother told him in 1940 that he intended to take care of his two sons. It is also very significant and persuasive that the larger note was made for the son who worked the longest period, a smaller note for the son that worked a shorter period and no note for the third son who did not work with his father at Rainier Gardens.

There is ample evidence of delivery of the note. It was in the safety deposit box of the claimant after his father's

death and, in addition to this, Robert Lanton testified that his father told him in 1946 at Robert's home in California, "I have left a note for Ralph for $5,000.00 and one for you for $3,000.00 which is payment for the work you performed at Rainbow when I didn't have anything to give you but promises. Again in a conversation he had with his father about three or four years later in front of the apartment building where his father was living in California, Robert Lanton testified that his father told him that Ralph had in his possession two notes, one for $5,000.00 for Ralph and one for $3,000.00 for him.

There is no error in the admission of evidence by the trial court. Counsel for appellant objected to testimony of the claimant and stated to the court that claimant was only competent to testify to what he knew after the death of the decedent and the trial court so limited claimant's testimony. The judgment order of the County Court of Boone County is affirmed.

Spivey, P.J. concurs
J. Crow concurs

JUDGMENT ORDER AFFIRMED.

A

Abstract

1st DIVISION

NO. 11489 Abstract only Agenda 4

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
MAY TERM, A.D. 1961

FILED
SEP 21 1961
PAUL V. WUNDER
Clerk Appellate Court Second District

VESTAGLAS, INC., a corporation, Plaintiff-Appellant, vs. GEORGE E. LLOYD and MADALIN LLOYD, Defendants-Appellees.	Appeal from the Circuit Court, Kane County.

McNEAL, J. -

The plaintiff, Vestaglas, Inc., a corporation, confessed judgment for $1678.50 and costs, including $158.50 for attorney fees, against the defendants, George E. Lloyd and Madalin Lloyd. The Circuit Court of Kane County granted a petition to vacate and set aside the judgment and permitted defendants to answer plaintiff's complaint. The issues formed by the complaint and answer were tried by the court without a jury. The court found the issues in favor of defendants and entered final judgment against plaintiff for costs. Plaintiff appealed.

The judgment by confession was entered on a cognovit included among the printed portions of a sales contract signed by the parties. By the contract Vestaglas agreed to furnish all labor and material necessary to manufacture and install light green fiber glass panels or jalousie walls on the porch of defendants' premises for $1520. The contract recited that defendants made a deposit of $500 and agreed to pay a balance of $1020 on completion, that the jalousie walls were "to be 8'6" west - 14' 10½" north - 8' 7" east" with aluminum doors at the southeast and southwest corners and an 18-inch knee wall, and that plaintiff agreed to install the doors and walls complete with screens, locks, etc., using defendants' roof, concrete slab and foundation.

VESTAGLAS, INC., a corporation,	
Plaintiff-appellant,	
vs.	
GEORGE E. LLOYD [illegible] INC.,	
Defendants-appellees.	

MCNEAL, J. -

The plaintiff, Vestaglas, Inc., a corporation, [illegible] judgment for $1092.50 [illegible], [illegible] against the defendants, [illegible] Court of Lake County [illegible] judgment and permitted defendants to [illegible] counterclaim. The issues formed by the complaint [illegible] without a jury. The court found [illegible] entered final judgment against plaintiff [illegible] appealed.

The judgment by confession was entered on a promissory [illegible] among the printed portions of a [illegible] signed by the parties. By the contract Vestaglas agreed to furnish all labor and material necessary to manufacture and install 11 [illegible] green fiber glass panels or jalousie walls on the porch of defendants' premises for $1320. The contract recited that defendants made a deposit of $300 [illegible] agreed to pay a balance of $1020 on completion, that the jalousie walls were to be 8'6" wide - 14' 10½" high - 8' 7" deep" with aluminum doors at the southeast and southwest corners and an 18-inch knee wall, and that plaintiff agreed to install the doors and walls complete with screens, locks, etc., using defendants' roof, concrete slab and foundation.

Plaintiff's printed form of contract also contained the following provisions: "This merchandise is being made to purchaser's specifications. If purchaser refuses installation the full amount becomes due immediately. * * * Since these items are custom-built to my/our specifications, sales contract is not subject to cancellation."

Plaintiff's evidence tended to show that all work was done in a workmanlike manner, that the panels were caulked and weatherproof, and that George Lloyd signed a completion certificate that all labor and material had been furnished and installed to his satisfaction. One of plaintiff's witnesses admitted that the panels were prefabricated, and that they are not identical in size.

Defendant Madalin Lloyd complained that the color of the fiber glass in the panels did not match the color of their blue entrance, and that plaintiff's representative told her that the color would match a sample of the blue she gave him. She also testified that the front door cannot be closed, and that plaintiff agreed to change the height of the kneewall from 18 inches to 24 inches. George Lloyd testified that the kneewall is 26 inches high instead of 22 inches as ordered, that the panels are higher than they should be and do not match the door panels, that the windows are different sizes,--one is two inches wider than the others, and are not plumb, that the transom over the door is crooked, that wood mullions between the windows have warped, and that he has an estimate that it will cost $800 to complete the work in a correct manner. He admitted that the signature on the completion certificate looks like his, but stated that he did not sign it.

Robert Patterson, a real estate salesman, testified that plaintiff's installation added nothing to the value of defendants' premises and was not in keeping with the quality of their home. John Feifer, a manufacturer of storm windows, investigated the installation and testified that the jalousies were not custom-made, that jalousies made to fit a given area should be of equal width, that the glazed

Plaintiff's printed form of contract also contained the following provisions: "This merchandise is being made to purchaser's specifications. If purchaser refuses installation the full amount becomes due immediately. * * * Since these items are custom-built to my/our specifications, sales contract is not subject to cancellation."

Plaintiff's evidence tended to show that all work was done in a workmanlike manner, that the panels were installed in accordance with the specifications, and that George Lloyd signed a completion certificate after all labor and material had been furnished and installed to his satisfaction. One of plaintiff's witnesses testified that the panels were properly installed, and that they were not damaged in size.

Defendant John Lloyd complained that the color of the fiber glass in the panels did not match the 2-foot blue entrance, and that plaintiff's representative told him that the color would match a sample of the glass he provided. John Lloyd testified that the front door cannot be closed, and that plaintiff agreed to change the height of the panels from 7' to [illegible]. George Lloyd testified that the overall is 13 inches wide instead of 12 inches as ordered, that the panels are higher than a [illegible] door and do not match the door panels, that the windows are different sizes, one is two inches wider than the other, and [illegible] plus 3, that the transom over the door is crooked, that wood mullions between the windows have warped, and that he has an estimate that it will cost $200 to complete the work in a correct manner. He admitted that the signature on the completion certificate looks like his, but stated that he did not sign it.

Robert Patterson, a real estate salesman, testified that plaintiff's installation added nothing to the value of defendants' premises and was not in keeping with the quality of their home. John Feifer, a manufacturer of storm windows, investigated the installation and testified that the jalousies were not custom-made, that jalousies made to fit a given area should be of equal width, that the glass

area of the doors should have equalled the height of the windows so as to eliminate the transoms, that the kick plates on the bottom of the doors should have been the same height as the side panels, and that the mullions between the windows should have been aluminum instead of wood. Feifer also testified that the windows are all out of square and that nearly all of them are out of plumb. Several photographs of the installation were exhibited in evidence without objection, and these exhibits tend to corroborate Feifer's opinion that plaintiff's installation was a very poor job of workmanship which added nothing to the value of defendants' property and depreciated its value $500.

The contract executed by the parties clearly required plaintiff to manufacture and install custom-built windows and doors made to defendants' specifications. It is undisputed that plaintiff furnished prefabricated items and that none was made especially for defendants' enclosure. Plaintiff concedes that the correct amount on the judgment by confession should have been $1020 and not $1520, plus attorneys' fees, and that the height of the kneewall was changed at defendants' request from the height specified in the contract.

Plaintiff contends that the evidence showed that the work was substantially completed in accordance with the contract. In general, the test of substantial performance is whether a substantial sum is required to complete the work, and where there are deviations of so essential character that they cannot be remedied without partially reconstructing the building, they do not come within the rule of substantial performance. 12 I.L.P. 548, Par. 402 Contracts. Evidence which tended to show that correction of deficiencies in plaintiff's installation would cost defendants $800, and that the installation depreciated the value of their property $500, afforded the trial court ample basis for rejecting plaintiff's contention that there was substantial performance in the instant case.

On the trial there was no denial of Madalin Lloyd's testimony that she requested that the panels match the blue of their entrance and

area of the doors should have equalled the height of the [illegible] so as to eliminate the transoms. That the kick plates on the bottom of the doors should have been the same height as the side panels, and that the mullions between the windows should have been aluminum instead of wood. Keller also testified that the windows were [illegible] of course, and that nearly all of them are out of [illegible]. Several photographs of the installation were exhibited in evidence [illegible] these exhibits were to corroborate Keller's opinion that plaintiff's installation was a very poor job [illegible] the value of defendant's property [illegible].

The contract in suit [illegible] plaintiff to manufacture and install certain aluminum doors made to defendant's actual location. [illegible] plaintiff furnished preliminary drawings [illegible] defendant's exclusive. Plaintiff concede[illegible] the judgment by confession should [illegible] attorney's fees, [illegible] defendant's counsel [illegible] defendant's request for the [illegible] specified in the contract.

Plaintiff contends that [illegible] evidence shows that the work was substantially completed in accordance with the contract. In general, the test of substantial performance is whether [illegible] required to complete the work, and where there [illegible] essential character that they cannot be remedied without partially reconstructing the building, they do not come within the rule of substantial performance. 12 I.L.P. 3[illegible], Sec. 4[illegible] Contracts. Evidence which tended to show that correction of deficiencies in plaintiff's installation would cost defendants $[illegible], and that the installation depreciated the value of their property $300, afforded the trial court ample basis for rejecting plaintiff's contention that there was substantial performance in the instant case.

On the trial there was no denial of Martin Lloyd's testimony that she requested that the panels match the blue of their entrance and

the sample she furnished plaintiff's representative. On appeal plaintiff argues that the contract clearly provided that light green fiber glass be furnished, and that the court cannot rewrite the contract for the parties. Since the contract contemplated a custom-built installation and referred to purchaser's specifications and the plaintiff readily changed the height specified in the contract for kneewalls, it is difficult to understand how compliance with Mrs. Lloyd's request with respect to the color of the glass would have involved any judicial rewriting of the contract.

With reference to the questions whether or not plaintiff's installation was weatherproof and completed in a workmanlike manner, the testimony of the witnesses was in conflict. Where testimony is contradictory in a trial without a jury, it is well established that the determination of the credibility of witnesses and the weight to be accorded their testimony are matters for the trial court and its findings will not be disturbed unless they are manifestly against the weight of the evidence. Eleopoulos v. City of Chicago, 3 Ill. 2d 247, 253, 120 N.E. 2d 555, 558.

The findings of the Circuit Court of Kane County are not against the manifest weight of the evidence, and its judgment is accordingly affirmed.

Affirmed.

SMITH, P.J., and DOVE, J., concur.

the sample she furnished plaintiff's representative. On appeal plaintiff argues that the contract clearly provides that light green fiber glass be furnished, and that the court cannot rewrite the contract for the parties. Since the contract contemplated a custom-built installation, an referral to [illegible] specifications in the plaintiff readily showed the exact fiber glass to be furnished in Smoewalls. It is difficult to overcome a verdict such as Lloyd's request with respect to the [illegible] and [illegible] involved any judicial rewriting of the contract.

With reference to the [illegible] installation was [illegible] and supplied [illegible] the testimony of the [illegible] contradictory in a [illegible] way, it [illegible] the determination of the credibility of witnesses [illegible] to be accorded their testimony [illegible] findings will not be disturbed unless they are [illegible] against the weight of the evidence. Thompson v. [illegible], [illegible] 253, 120 N.E. 2d 155, 156.

The findings of the trial court of [illegible] are not against the manifest weight of the evidence, so the judgment is accordingly affirmed.

Affirmed.

SMITH, P.J., and DOVE, J., concur.

32 #1

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

General No. 10364 | Agenda No. 5

John F. Koester, d/b/a Paxton Concrete Products,

Plaintiff-Appellant

vs.

Huron Development Company, an Illinois Corporation, George Day, d/b/a Day Construction Company, and Western Surety Company, a South Dakota Corporation,

Defendants-Appellees.

Appeal from the Circuit Court of Champaign County

REYNOLDS, J.

This is a suit to foreclose under a material-man's lien. Plaintiff manufactured and sold concrete blocks. George Day, one of the defendants, was a contractor and had contracted with the plaintiff to furnish the concrete blocks for use in the building of seventy-five homes Day was building for the defendant Huron Development Company. The defendant

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

General No. 10264 | Agenda No. 5

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vs.

Huron Development Company, an Illinois Corporation, George Day, d/b/a Day Construction Company, and Western Surety Company, a South Dakota Corporation,

Defendants-Appellees.

Appeal from the Circuit Court of Champaign County

REYNOLDS, J.

This is a suit to foreclose under a materialmen's lien. Plaintiff manufactured and sold concrete blocks. George Day, one of the defendants, was a contractor and had contracted with the plaintiff to furnish the concrete blocks for use in the building of seventy-five homes Day was building for the defendant Huron Development Company. The defendant

Huron Development Company owned the land upon which the homes were being built. Plaintiff furnished blocks in the amount of $5,189.13 to Day, up to June 25, 1956, that being the last day materials were furnished. On October 22, 1956, Day filed his petition in bankruptcy. On October 24, 1956, plaintiff served defendant Huron Development Company a notice in writing that he claimed a mechanic's lien in the amount of $5,189.13. On October 30, 1956, Huron Development Company filed a complaint in Circuit Court to quiet title of the property involved, and asked and was given leave to file bond for release of the alleged mechanic's lien. On June 24, 1958, defendant Day was discharged in bankruptcy and on June 24, 1958, plaintiff here filed his complaint for foreclosure of the mechanic's or materialman's lien against the Huron Development Company, George Day, and the Western Surety Company, the maker of the bond. Later, this complaint was amended and the defendants moved to dismiss the complaint on the grounds that plaintiff did not file a 60 day notice on the defendant Huron Development Company, that suit was not timely filed and that the suit was barred by laches. The trial court allowed the motion and dismissed the suit. The

plaintiff appeals to this court.

In the appeal, neither the plaintiff nor defendant give much weight to the theory of laches or that the suit was not timely filed. The real question raised by the appeal is whether the 60 day notice to the owner is mandatory and if not given within the 60 day period after the completion of the contract, does that defeat the sub-contractor's lien for materials furnished.

Section 24, Chapter 82, Illinois Revised Statutes is relied upon by the defendants. That section provides that sub-contractors, or party furnishing labor or materials, may at any time after making his contract with the contractor, and shall within sixty (60) days after the completion thereof, cause a written notice of his claim and the amount due thereunder, to be personally served on the owner, or his agent. The defendants do not question the service of such a notice or the manner of service, but contend that the notice was served 121 days after the completion of the furnishing of materials by the plaintiff. The notice was served two days after Day, the original contractor, had filed in bankruptcy and abandoned the contract.

plaintiff appeals to this court.

In the appeal, neither [illegible] much weight to the theory [illegible] thinly filed. The real [illegible] whether the [illegible] not given [illegible] the contract, [illegible] materials [illegible].

Section 4, [illegible] lied upon [illegible] contractors, or [illegible] any time after [illegible] within ninety [illegible] written notice of his claim [illegible] be personally served [illegible] do not constitute the [illegible] service, but contend that [illegible] the completion of the [illegible] The notice was served [illegible] but filed in [illegible].

The status of the plaintiff as a sub-contractor, the amount of materials furnished, the abandonment of the contract by Day, and the giving of the notice and its form, are not questioned, so that a finding on the necessity of the notice within 60 days will dispose of the issues involved here.

The language of the Statute requiring notice is plain. It says the sub-contractor shall, within sixty (60) days after the completion of the work cause a written notice of his claim to be served upon the owner or his agent. It is conceded that the notice was not served until 121 days after the final date of furnishing materials by the plaintiff. This notice would not have been necessary if the contractor Day had included the plaintiff in his sworn statement of materialmen and other creditors. Section 5 of Lien Act. But the contractor did not do so.

The case of Pittsburgh Plate Glass Co. v. Kransz, 291 Ill. 84, held that the lien of the sub-contractor existed before the notice was served, and that the lien was not defeated by the original contractors being adjudged bankrupts, but that the notice of the lien must be given within the time required by statute to preserve and enforce it. This view was affirmed in United Cork Companies v. Volland, 365 Ill. 564, 573. The doing

The status of the plaintiff [illegible] a [illegible] account of materials furnished, the [illegible] by day, and the giving of the notice [illegible] questioned, so that a finding of the [illegible] within 60 days will dispose of the [illegible].

The language of the [illegible] requirements [illegible] It says the [illegible] the completion of the work [illegible] to be served upon the [illegible] the notice was not served until [illegible] of furnishing [illegible] not have been necessary [illegible] plaintiff in his [illegible] ore. Section 3 of [illegible]

The case of [illegible] 84, held that the filing of a [illegible] the notice was served, and that the [illegible] original contractor [illegible] notice of the lien must be given within the time required by statute to preserve one's [illegible] United Corp. Commerce v. Williams, [illegible] 1.1. [illegible] 1921. The [illegible]

of the work or furnishing of materials gives an inchoate lien or right to acquire a lien, and the statute prescribes the steps to be taken to perfect the lien. The Decatur Bridge Co. v. Standart, 208 Ill. App. 592.

In the case of Liese v. Hentze, 326 Ill. 533, the court said: "The contractor or materialman's right to a lien depends upon service of notice to the owner unless the original contractor has furnished the owner with a sworn statement as to contractors and materialmen, as required by the act. (Butler & McCracken v. Gain, 128 Ill. 23.) While the act is to be liberally construed as a remedial act, yet mechanics' liens exist only by virtue of the statute creating them, and such statutes must be strictly followed with reference to all requirements upon which the right to a lien depends. (North Side Lash Co. v. Hecht, 295 Ill. 515; Cronin v. Tatge, 281 id. 336; May Brick Co. v. General Engineering Co. 180 id. 535.)"

While the case of Roth v. Lehman, 1 Ill. App. 2d 94, does not rule directly on the point at issue here, the language is significant. The court in that case said: "Mechanics' liens are in derogation of the common law and, therefore, the statute

creating them is to be strictly construed. Butler & McCracken v. Gain, 128 Ill. 23, 27; Brennan v. McEvoy & Co., 196 Ill. App. 336, 341; Schwulst Gerling Co. v. Frost, 269 Ill. App. 213, 223. 'This is true notwithstanding section 39 (Ill. Rev. Stats. 1953, ch. 82, #39; Jones Ill. Stats. Ann. 74.39) of the act which provides: "This act is and shall be liberally construed as a remedial act."' North Shore Sash and Door Co. v. Hecht, 295 Ill. 515, 519; Schwulst Gerling Co. v. Frost, supra. 'The remedy by mechanic's lien is in addition to the ordinary remedies afforded by the common law and is a privilege enjoyed by one class of the community above other classes.' Colp v. First Baptist Church of Murphysboro, 341 Ill. 73, 78; Schwulst Gerling Co. v. Frost, supra. 'A party seeking to enforce such a lien must bring himself strictly within the terms of the statute.'"

The case of Shaffer v. Cullerton Corp. 13 Ill. App. 2d 72 referring to the Roth v. Lehman case, said: "As this court has previously pointed out, notice to the owner is the very substance of the basis upon which a mechanic's lien may be predicated."

In the case of Roth v. Lehman, 1 Ill. App. 2d 94, the court

gives its reasons for holding that the statute must be strictly complied with as to notice, in this language: "This is the nature of the claim itself. It is a claim which, without the express consent of the owner of property, becomes a lien, that is to say, a mortgage on the property without those formal requirements of writing, signature, acknowledgement, and recording essential to a mortgage or trust deed. An extension of such a claim ought not to be permitted except on strict compliance with the statute."

Because the sub-contractor did not serve his notice upon the defendant Huron Development Company within the sixty day period provided by Section 24 of the Lien Act, the lien was not perfected and the order and judgment of the circuit court dismissing the complaint was proper.

Judgment affirmed.

ROETH, P.J. and CARROLL, J., concur.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

General No. 10365 | Agenda No. 6.

Burton E. Montz and Midwest Bag Company, a corporation,

Plaintiffs-Counter Defendants-Appellees,

vs.

Wayne R. Lester,

Defendant-Counter Plaintiff-Appellant.

Appeal from the Circuit Court of Vermilion County.

REYNOLDS, J.

Judgment was entered in a justice of the peace court against Wayne R. Lester and in favor of the plaintiffs. Lester appealed to the Circuit Court. Plaintiffs moved to dismiss the appeal on the ground that Lester failed to comply with Rule 12.2 of the Fifth Judicial Circuit which provided that on appeals from justices of the peace, the party appealing shall give notice of the filing of the transcript in the Circuit Court to all parties, in the manner prescribed by Supreme Court Rule 7, within 10 days

from the date the transcript is filed. The Circuit Court dismissed the appeal and the defendant Lester appeals to this court.

The Statute provides two procedures of appeal from a judgment of a justice of the peace. Section 116, Chapter 79, Illinois Revised Statutes. The party appealing may file an appeal bond with and pay the appeal fee to the justice. Or, he may file his appeal bond with the clerk of the court to which the appeal is taken, and the clerk then issues a summons to the appellee. Where the summons is issued, the notice required by the rule is unnecessary. If the appeal is filed with the justice, the rule would apply.

The rule in question is one of the Uniform Rules of Practice for the Circuit and Superior Courts of Cook County, and has been adopted by all but three Judicial Circuits of the State of Illinois. Chapter 110, Section 312.2, Circuit Court Rule 12.2.

Section 64 (2) of the Civil Practice Act requires a party appealing from a justice court to file a jury demand not later than 15 days after service of notice of the filing of transcript on appeal. Rule 12.2 is a further requirement of notice to the appellee.

from the [illegible] the Municipality [illegible] [illegible] dismissed the appeal and the [illegible] [illegible] this court.

The statute provides [illegible] [illegible] judgment of [illegible] [illegible] [illegible] Illinois Revised [illegible] [illegible] appeal [illegible] [illegible] by [illegible] [illegible] which the [illegible] to the [illegible] [illegible] the justice, [illegible]

The rule in [illegible] for the Circuit [illegible] been adopted by all [illegible] of Illinois. Chapter 110, [illegible] 1952.

Section 68 (2) of the Civil Practice Act [illegible] appealing from a justice of the peace [illegible] within 10 days after [illegible] the filing [illegible] an appeal. Rule 11 [illegible] further [illegible] notice [illegible] required.

The right of the circuit courts to make rules is provided by Section 72.28 of Chapter 37, Illinois Revised Statutes, in the following language: "The said courts may, from time to time, make all such rules for the orderly disposition of business before them as may be deemed expedient, consistent with law." (Underscoring ours.)

This right to make rules on the part of the Circuit Courts is further spelled out in Section 2 (2) of the Civil Practice Act, in this language: "Subject to rules the city, town, county, circuit, superior and Appellate Courts may make rules regulating their dockets, calendars, and business."

The sole question before this court is whether the Circuit Court had the right to dismiss the appeal because the appellant failed to comply with Rule 12.2 of the Rules of Practice of the Fifth Judicial Circuit.

Generally, courts have no power to impose upon parties any conditions as to the exercise of their rights under the law that are not imposed by the law. In re Estate of Kurlandsky, 308 Ill. App. 297, 301. Rules of practice are authorized to carry into effect laws applicable to cases being tried by that court.

The cause is reversed and remanded to the Circuit Court with instructions to re-instate the appeal.

Reversed and remanded with directions.

ROETH, P.J. and CARROLL, J., concur.

Such language does not contemplate that statutes, being administered in that court, shall be changed by rules of practice adopted by it. Such would be judicial legislation. Rules of practice are to administer statutes as they are and not to change them. Universal Credit Co. v. Antonsen, 374 Ill. 194, 199. Matters of form, of practice, of procedure and for the orderly regulation of the business of the court are all proper subjects for rules, but matters of substance which impose additional burdens upon a litigant, not contemplated by statute, are invalid. People ex rel. Barnes v. Chytraus, 228 Ill. 194, Kinsley v. Kinsley, 388 Ill. 194, 197; People v. Graber, 397 Ill. 522.

Here, the defendant had perfected his appeal by doing all acts required by the Statute. The case was properly before the Circuit Court. The giving or failure to give the notice required by Rule 12.2 is procedural and not jurisdictional. The rule is intended to facilitate the business of the court. It is for the orderly regulation of that business. It furthers the trend of our judicial system to require the giving of due notice to the opposing party of all acts done or proposed to be done. As such, the rule relates only to procedure and the dismissing of the appeal for failure to give the notice required by the rule was in error.

1st DIVISION

Abstract

NO. 11399 Agenda 19

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
OCTOBER TERM, A.D. 1960

FILED
OCT 5 1961
PAUL W. WUNDER
Clerk Appellate Court Second District

MILTON A. LUNDSTROM, Plaintiff-Appellant, vs. WINNEBAGO NEWSPAPERS, INC., a Delaware corporation, Defendant-Appellee.	Appeal from the Circuit Court, Winnebago County.

McNEAL, J. -

The Circuit Court of Winnebago County sustained a motion to strike and dismiss Milton A. Lundstrom's complaint for libel and entered final judgment in favor of the defendant, Winnebago Newspapers, Inc., a Delaware corporation. Plaintiff appealed.

Plaintiff filed his complaint on April 16, 1959, and alleged that defendant published articles libeling him in the Rockford Morning Star on January 23 and 25, 1958. Section 13 of the Limitations Act (Par. 14, Ch. 83, Ill. Rev. Stat. 1957) requires that actions for libel be commenced within one year next after the cause of action accrued. Plaintiff's action was clearly barred by section 13, unless the limitation was extended by section 24 of the Act (Par. 24a, Ch. 83, Ill. Rev. Stat. 1957). Plaintiff alleged section 24 in his complaint, as follows:

> "In any of the actions specified in any of the sections of this act, if judgment shall be given for the plaintiff, and the same be reversed by writ of error, or upon appeal; or if a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff; or, if the plaintiff be nonsuited, then, if the time limited for bringing such action shall have expired during the pendency of such suit, the said plaintiff, his or her heirs, executors, or administrators, as the case shall require, may commence a new action within one year after such judgment reversed or given against the plaintiff, and not after."

1st DIVISION

Attorneys:

No. 11399 — Decide 19

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
OCTOBER TERM, A.D. 1960

MILTON A. LUNDQUIST,

Plaintiff-appellant,

vs.

WILMINGTON NEWSPAPERS, INC., a
Delaware corporation,

Defendant-appellee.

appeal from the
Circuit Court,
Winnebago County.

MCGAL, J. -

The Circuit Court of Winnebago County sustained a motion to strike and dismiss action ... entered a judgment for plaintiff and entered final judgment in favor of the defendant, Wilmington Newspapers, Inc., a Delaware corporation. Plaintiff appealed.

Plaintiff filed his complaint on April 16, 1959, and alleged that defendant published articles libeling him in the Rockford Morning Star on January 23 and 24, 1959. Section 13 of the limitations act (Par. 14, Ch. 83, Ill. Rev. Stat. 1957) requires such actions for libel be commenced within one year next after the cause of action accrued. Plaintiff's action was clearly barred by section 13, unless the limitation was extended by section 21 of the act (Par. 24a, Ch. 83, Ill. Rev. Stat. 1957). Plaintiff alleged section 24 in his complaint, as follows:

"In any of the actions specified in any of the sections of this act, if judgment shall be given for the plaintiff, and the same be reversed by writ of error, or upon appeal; or if a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff; or, if the plaintiff be nonsuited, then, if the time limited for bringing such action shall have expired during the pendency of such suit, the said plaintiff, his or her heirs, executors, or administrators, as the case shall require, may commence a new action within one year after such judgment reversed or given against the plaintiff, and not after."

To comply with section 24 plaintiff also alleged that on January 21, 1959, he filed a cause of action in the District Court of the United States for the Northern District of Illinois, Western Division, entitled Milton A. Lundstrom vs. Winnebago Newspapers, Inc., a Delaware corporation; and that his complaint in the Federal court "contained in count I the same cause of action which is alleged in count I of this complaint and contained in count II the same cause of action which is alleged in count II of this complaint." It was alleged that the jurisdiction of the Federal court was based upon diversity of citizenship between the plaintiff and the defendant corporation; that although that court denied defendant's motion to strike based on the ground that the publications were not libelous per se, the court on its own motion dismissed the complaint because defendant has its principal place of business in Illinois and there is no diversity of citizenship.

On this appeal defendant contends that the trial court properly sustained its motion to dismiss the complaint because the cause of action attempted to be alleged is barred by the statute of limitations and because the provision permitting parties to file new actions within one year is not applicable to the instant case. In the trial court defendant moved to strike and dismiss the complaint for the reasons that the alleged causes did not accrue within the time limited by section 13 of the statute of limitations; that plaintiff does not bring himself within the purview of section 24 of the statute "for the reasons that: a. Judgment has not heretofore been given for the plaintiff and reversed; b. Judgment has not heretofore been given against the plaintiff; c. Plaintiff in prior action filed has not been non-suited. It further appears * * * that plaintiff has not met nor conformed with the conditions provided in Chapter 83, Illinois Revised Statutes, Section 24 (a) so as to permit the filing of an alleged new action"; and that there was another suit pending between the same parties alleging the same cause of action.

To comply with section 24, Judicial Code, as alleged also on January 21, 1939, he filed a cause of action in the District Court of the United States for the Northern District of Illinois, Eastern Division, entitled Walter [illegible] v. Interstate [illegible] Corporation, Inc., a Delaware corporation; and that his complaint in the federal court "combined in count 1 the same cause of action which is alleged in count I of this complaint and pleadings in count II the same cause of action which is alleged in count II of this complaint." It is alleged that the jurisdiction of the federal court [illegible] diversity of citizenship between the plaintiff and the corporation [illegible] although that court lacked jurisdiction of the parties [illegible] on the ground that the pleadings [illegible] jurisdiction [illegible], in truth and in fact and motion dismissed the complaint [illegible] principal place of business in Illinois and [illegible] diversity of citizenship.

In this court defendant moved to strike and dismiss the complaint for the reasons that the alleged causes did not accrue within the time limited by section 13 of the statute of limitations; that plaintiff does not bring himself within the purview of section 24 of the statute "for the reasons that: a. Judgment has not heretofore been given for the plaintiff and reversed; b. Judgment has not heretofore been given against the plaintiff; c. Plaintiff in prior action filed has not been non-suited. It further appears * * * that plaintiff has not met not conformed with the conditions provided in Chapter 83, Illinois Revised Statutes, Section 24 (a) so as to permit the filing of an alleged new action"; and that there was another suit pending between the same parties alleging the same cause of action.

An affidavit in support of defendant's motion shows that the other suit pending was the action which this court reviewed in 27 Ill. App. 2d 128. Our opinion in that case sets forth the alleged libelous articles published on January 23, and 25, 1958, and also another article published on February 5, 1958. Since the complaint in that suit was filed on February 4, 1959, the articles published in January, 1958, were barred by the one year statute of limitations, and were not reviewed in 27 Ill. App. 2d 128. In our decision in that case only the article published on February 5, 1958 was reviewed and held not to be libelous per se.

In his memorandum decision the trial judge concluded that section 24 applies to procedures in the State court and provides for an extended period of limitation in the State court when proceedings in the State court would deprive the plaintiff of his cause of action by limitation, and therefore struck the complaint and rendered judgment for defendant.

Defendant makes no point and presents no authority for the proposition that section 24 applies only to procedures in the State court or that it does not protect a party who erroneously sued in the Federal court instead of the State court. Defendant's principal contention here is that section 24 is applicable only to cases where the records of the two suits are such that the court can determine from an inspection of the records that the causes of action are the same. In support of this contention defendant's counsel cites Gibbs v. Crane Elevator Co., 180 Ill. 191 (1899). In that case plaintiff filed a praecipe, summons was served, and thereafter plaintiff was non-suited because he failed to file a declaration by the second term of court. To the declaration in the second suit defendant pleaded the statute of limitations, and plaintiff filed a replication setting up the commencement of his former suit. Thus, where there was no means of ascertaining what plaintiff intended to allege in his first suit, the Court said that the provisions of section 24 can only practically be applied to causes

An affidavit in support of defendants' motion asserts that two other suits pending was the motive [illegible] reviewed in 27 Ill. App. 2d 128. Our opinion in that case [illegible] for libelous articles published in [illegible] 1958, and also another article published in [illegible] 1959. These claims [illegible] in that suit was filed on [illegible], 1959. [illegible], published in January, 1958, were barred by the [illegible] of limitations, and were not reviewed in 27 Ill. App. 2d. [illegible] decision in that case only the article published on [illegible] 1959, [illegible] and found not to be libelous per se.

In his memorandum [illegible] section 21 applies to proceedings in the [illegible] an extended period of limitation in [illegible] proceedings in the state court would deprive the plaintiff of the [illegible] of action by limitation, and therefore [illegible] for defendant.

Defendant makes no point and presents no [illegible] for the proposition that section 21 applies only to proceedings in the same court or that it does not protect a party who [illegible] in the Federal court instead of the state court. [illegible] contention here is that section 21 is applicable only to cases where the records of the two suits are such that the court can determine from an inspection of the records that the cause of action are the same. In support of this contention defendant's counsel cites [illegible] v. Crane Elevator Co., 180 Ill. 191 (1899). In that case plaintiff filed a praecipe, summons was served, and thereafter plaintiff was non-suited because he failed to file a declaration by the second term of court. To the declaration in the second suit defendant pleaded the statute of limitations, and plaintiff filed a replication setting up the commencement of his former suit. Thus, where there was no means of ascertaining what plaintiff intended to allege in his first suit, the court said that the provisions of section 21 can only practically be applied to causes

where the record in the two suits is such as that by an inspection of the same the court can determine as a matter of law, that the first was for the identical claim and cause of action set up in the second.

Defendant also urges that the relief provisions of the Limitations Act are not available to a party who does not act in good faith, and quotes from Sachs v. Ohio National Life Insurance Co., 131 F. 2d 134, as follows: "The Act is remedial reflecting a legislative intent to protect the party who brings the action in good faith from complete loss of relief on the merits merely because of procedural defect." Defendant's counsel argues that since plaintiff knew that defendant published a newspaper at Rockford, he must have known that its principal place of business was there, and therefore his action in the Federal court was not commenced in good faith. He suggests that plaintiff should have recommenced his case in the Federal court under the provisions of section 24, and that court, having the records in both cases before it, could have determined whether or not the causes of action were identical.

Since the Federal court on its own motion dismissed plaintiff's action for lack of jurisdiction, recommencement of the case in that court would have resulted only in another dismissal, the reason for dismissal of the first action being equally applicable to the second. It does not necessarily follow that defendant's principal place of business was in Rockford because it published a newspaper there, or that plaintiff did not act in good faith when he sued defendant in the Federal court under the mistaken belief that there was diversity of citizenship.

In its motion to dismiss filed in the trial court, defendant made no specific objection that the complaint failed to disclose facts upon which the court could determine that the complaint contains the same causes of action as those alleged in the Federal court. The statement in the motion "that plaintiff has not met nor conformed with the conditions provided in Chapter 83, Illinois Revised Statutes, Section 24 (a) so as to permit the filing of an alleged new action", has no

where the record in the two actions was either by or transaction of the same the court can determine as a matter of law, that the first was for the identical claim and could [illegible] in the second.

Defendant also urged that [illegible] limitations for [illegible] [illegible] Rule, and quotes from [illegible] 7. 24 Ga, as follows: [illegible] latent to perform [illegible] complete loss of [illegible] defense." [illegible] defendant published a [illegible] principal place of [illegible] Federal court [illegible] should have [illegible] violations of section 24, [illegible] before it, could have [illegible] were identical.

Since the Federal Court [illegible] action for lack of jurisdiction, [illegible] would have resulted [illegible] of the first action being [illegible] necessarily follow that [illegible] Rochford because it published [illegible] not act in good faith when he made [illegible] the plaintiff held that there was diversity of citizenship.

In its motion to dismiss filed in the [illegible] court, defendant made no specific objection that the complaint failed to disclose facts upon which the court could determine that the complaint contains the same causes of action as those alleged in the Federal court. The statement in the motion "that plaintiff has not met or complied with the conditions provided in chapter 63, Illinois Revised Statutes, section 24 (a) so as to permit the filing of an alleged new action", has no

reference to the objection now urged. Section 42 (3) of the Civil Practice Act provides that all defects in pleading, either in form or substance, not objected to in the trial court, are deemed waived. Section 45 (1) of the Practice Act requires that all objections to pleading shall be raised by motion and that the motion shall point out specifically the defects complained of. By failing to specify this objection to plaintiff's complaint in its motion to dismiss filed in the trial court, defendant waived the objection, and it cannot be urged for the first time here. Gustafson v. Consumers Sales Agency, 414 Ill. 235.

Plaintiff alleged generally that his complaint in the Federal court contained the same causes as those alleged in the instant complaint. Section 24 of the Limitations Act specified no conditions to be met by a party seeking relief thereunder, and it contains no express restriction or implication that such relief is limited to a party non-suited in a State court. In Wiehe v. Atkins, 126 Ill. App. 1, plaintiff recovered a judgment in the circuit court on appeal from a judgment rendered by a justice of the peace. The defense in the trial court and on appeal was that the suit was barred by limitations. However, transcripts were introduced by plaintiff showing that plaintiff had commenced a prior suit in justice court, that changes of venue were granted, and that the suit was dismissed on defendant's motion. On appeal defendant contended that the transcripts did not show that the prior suit was for the same cause of action, and that the identity of the causes could not be shown by oral evidence. The Court held that the dismissal was an involuntary non-suit which extended the period of limitation, and in affirming the judgment, said: "Parol evidence of what occurred on a former trial, when pleadings are general, and this cannot be determined from the record, is always admissible. Wright v. Griffey, 147 Ill. 496, 500." In the Sachs case, cited by defendant, the Circuit Court of Appeals, Seventh Circuit, reviewed the Illinois decisions pertaining to the interpretation of "non-suit" as used in

reference to the objection now urged. Section 42 (3) of the Civil Practice Act provides that all defenses in pleading, either in form or substance, may be objected to in the trial court. [illegible] Section 41 (1) of the Practice Act [illegible] objections to pleading shall be raised by motion and not [illegible] shall [illegible] one specifically the [illegible] [illegible] to specify this objection to plaintiff's complaint in [illegible] the filed in the trial court, [illegible] urged for the first time [illegible] urged, 414 Ill. 237.

Plaintiff's other contention [illegible] power conferred [illegible] complaint. Section 4a of [illegible] to be met by a party [illegible] express rescission or [illegible] party non-suited [illegible] plaintiff recovered [illegible] judgment rendered by a jury [illegible] court and on appeal was that the [illegible] However, transcripts were introduced by stipulation [illegible] had commenced a prior suit in Jackson county. [illegible] were erroneous, and that the suit was dismissed on defendant's motion. On appeal defendant contended that the [illegible] prior suit was for the same [illegible] the causes could not be shown by oral evidence. The court held that the disease was an involuntary non-suit which extended the period of limitation, and in affirming the judgment, said: "Proof evidence of what occurred on a former trial, when pleadings are general, and this cannot be determined from the record, is always admissible. Ridge v. Kelley, 147 Ill. 456, 300." In the Eagle case, cited by defendant, the Circuit Court of Appeals, Seventh Circuit, reviewed the Illinois decisions pertaining to the interpretation of "non-suit" as used in

section 24, and held that a dismissal for want of jurisdiction is clearly an involuntary dismissal and within the meaning of "non-suit" as used in that section of the statute. The Court also said that such remedial statutes should be liberally construed, so as to prevent destruction of the purpose of the legislation.

It is our opinion that the provisions of section 24 of the Limitations Act afford relief for a plaintiff nonsuited in the Federal court, and that plaintiff's allegations with reference to the identity of the causes of action were sufficient when tested by the objections made in the trial court by defendant's motion. We therefore conclude that the Circuit Court of Winnebago County improperly struck plaintiff's complaint, that the judgment in favor of defendant was erroneous, and that it should be and it hereby is reversed, and the cause remanded with directions to overrule defendant's motion to strike and dismiss plaintiff's complaint.

Reversed and remanded.

SMITH, P.J. and DOVE, J. Concur

section 24, and held that a Hammond [illegible] of [illegible] is
[illegible] an involuntary dismissal [illegible] [illegible]
as used in this section of the [illegible]. [illegible]
[illegible] remedial measures [illegible] [illegible]
construction of the [illegible] of the [illegible].

In [illegible] that [illegible] [illegible]
administrator [illegible] [illegible]
federal [illegible], and [illegible] [illegible]
the [illegible] of [illegible] [illegible]
the objectives [illegible] [illegible]
[illegible] [illegible]
[illegible] [illegible]
of [illegible] [illegible]
[illegible], and [illegible] [illegible]
[illegible] [illegible]

Revised [illegible].

Smith, F.J. and Dove, A. [illegible]

Gen. No. 11476 Abstract Agenda 1

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT - SECOND DIVISION

MAY TERM, A. D. 1961

DONALD CAMERON, et al., Plaintiffs-Appellants, vs. THE VILLAGE OF CLARENDON HILLS, ILLINOIS, a muncipality, and KELLER HEARTT LUMBER & FUEL CO., an Illinois Corporation, Defendants-Appellees.	Appeal from the Circuit Court of DuPage County.

CROW, J.

This is an appeal by the plaintiffs, Donald Cameron et al., from a decree dismissing the suit for want of equity after a trial on the merits. The suit sought a declaratory judgment to declare the operation by the defendants Keller-Heartt Lumber and Fuel Co. and E. A. Keller Co. of a concrete ready-mixing plant on the real estate of the defendant Keller-Heartt etc. Co. to be contrary to the provisions of the zoning ordinance of the defendant Village of Clarendon Hills. The Court found that the plaintiffs had proved no special damages; that the defendant Keller-Heartt Lumber and Fuel Co. in applying for and securing the necessary building permits from the Village of Clarendon Hills, and in thereafter erecting the improvements in question on its premises, expending over $100,000.00 on the $140,000.00 project before this suit was filed, acted in good faith and in reliance upon the permits, and the plaintiffs are estopped from bringing this suit; and that the plaintiffs failed to prove any of their other claims by a preponderance of the evidence.

The complaint, filed March 20, 1956, set forth that the defendant Village of Clarendon Hills is a municipality in the County of DuPage, State of Illinois, and that at the time in question there was in effect a zoning ordinance which, among other things, provides that the property occupied by the defendant Keller-Heartt Lumber and Fuel Company, had it been occupied by that defendant as and for a lumber, material, and coal yard and oil depot, was zoned for industrial purposes; the defendant Keller-Heartt Lumber and Fuel Company applied for and received a building permit for a structure to be used in connection with the operation of a concrete ready-mix plant; at the time the building permit was applied for the zoning ordinance limited the height of buildings or structures on the property of the defendant to 45 feet; the building so constructed under the permit exceeded 45 feet in that it was 67 feet high; subsequent to the application for the building permit the President and Board of Trustees of the Village of Clarendon Hills passed a purported ordinance known as Ordinance No. 159 in the following language:

> "Be it ordained by the President and Board of Trustees of the Village of Clarendon Hills that elevator bulkheads and necessary mechanical appurtenances constructed in connection with concrete material handling equipment now located upon Keller-Heartt Lumber and Fuel Co. property if otherwise complying with the Village Ordinance may have a height of not to exceed sixty-seven feet.";

prior to the adoption of that ordinance there had been no public hearing before the Zoning Board of Appeals or any other body, committee, or commission of the Village of Clarendon Hills, and there was no recommendation (from) any such Building Committee or Commission to the Village of Clarendon Hills that the operation of a concrete ready mixing plant on the property by the defendant would (not) create objectionable noise, dust, fumes, and gasses

as prohibited under the zoning ordinance referred to in the complaint; that the operation of such ready-mix concrete plant in the structure for which the building permit was issued would decrease the value of the property of the plaintiffs to a very great extent; the action of the Building Commission and the Board of Appeals was void and of no effect under the ordinance of the Village of Clarendon Hills, and the action of the President and Board of Trustees of the Village of Clarendon Hills in attempting to adopt the purported Ordinance No. 159 was void and of no effect; and that the operation of the proposed business on the premises would be a public nuisance. The complaint prayed that the building permit be declared null and void, the purported Ordinance No. 159 be declared null and void, and the operation of the ready-mix plant be declared contrary to the zoning ordinance.

The answer of the defendant Village of Clarendon Hills admits the issuance of a building permit; admits the zoning ordinance; denies ordinance No. 159 is invalid; and denies all of the other allegations of the complaint. The answer of the defendants Keller-Heartt Lumber & Fuel Co. and E. A. Keller and Co. admits the zoning ordinance; admits the operation of the ready-mix plant; admits the application for a building permit; admits the structure is over 45 feet; denies the alleged special damages of the plaintiffs; for a further defense alleges that the zoning ordinance is unreasonable and unconstitutional; and as a further defense pleads estoppel of the plaintiffs for failure to proceed within a reasonable time after notice of the issuance of the building permit.

The plaintiffs state in their theory of the case that they had improved their properties with family dwellings prior to the

as prohibited under the zoning ordinance referred to in the complaint; that the operation of such recreation centers was in the nature of a nuisance for which the building permit was [illegible] decrease the value of the property [illegible] [illegible] power exists; the action of the [illegible] Board of Appeals was void [illegible] of the village or director [illegible] and Board of Trustees [illegible] [illegible] to compel the [illegible] effect; and that the [illegible] premises would be a public [illegible] the building permit [illegible] ordinance No. [illegible] the recreation [illegible] the recreation plan be declared [illegible]

The [illegible] and to the issuance of a building permit [illegible] director denies [illegible] the other allegations of the complaint. [illegible] and Roller-Skate [illegible] with the zoning ordinance [illegible] plant; that the application [illegible] structure is over 45 feet [illegible] the plaintiffs for a further [illegible] dismiss is unreasonable and [illegible] defense plaintiffs contend of the plaintiffs for failure to proceed within a reasonable time after notice of the issuance of the building permit.

The plaintiffs state in their brief of this case that they had improved their properties with family dwellings prior to the

applications for the building permits here involved and after the adoption of the zoning ordinance and had relied on that ordinance; they, or at least many of them, by reason of their properties being in close proximity to the property here concerned, suffered special damage different from the residents of the community as a whole; the ready-mix plant caused excessive noise, dust, and increased truck traffic; and the decree is against the manifest weight of the evidence.

The defendants' theory is that the decree is supported by the evidence and the plaintiffs do not attempt to show otherwise; the plaintiffs proved no special damage and that is an insuperable bar to their suit; the plaintiffs are estopped under the circumstances to maintain this suit; the defendants' structure does not violate the zoning ordinance; and the structure is not a nuisance.

It appears from the evidence that in August, 1955, the defendant Keller-Heartt Lumber and Fuel Co. obtained from the defendant Village of Clarendon Hills building permits authorizing the construction of a materials handling plant upon the property owned by it in the Village. The construction described in the permits began shortly after the procuring thereof and was substantially completed by May, 1956. The cost of construction was in excess of $140,000.00, over $100,000.00 of which was spent prior to the institution of this suit. Prior to this suit neither the plaintiffs or anyone else took any action to contest the validity of the permits. The installation is located 139 feet from the company's Park Avenue south lot line. It is designed primarily to handle heavy building materials; its present use is to load transit mix trucks with sand, stone, cement and water, which ingredients

applications for the building permits have involved and after the adoption of the [illegible] ordinance [illegible] relied on that ordinance [illegible], or [illegible] of them, by reason of their properties [illegible] in close proximity to the property here concerned, suffered special [illegible] different in kind from [illegible] of the community as a whole; the [illegible] dust, and [illegible] the [illegible].

The defendants' [illegible] the evidence [illegible] the plaintiffs [illegible] able [illegible] otherwise [illegible] does not [illegible] a [illegible].

It appears [illegible], the defendant [illegible] Company [illegible] the construction [illegible] the property owned by [illegible]. The construction [illegible] permits began [illegible] substantially completed [illegible], 1937. The cost of construction was in excess of $150,000.00, and $100,000.00 of this was spent prior to the institution of this suit. Prior to this time neither the plaintiffs or anyone else took any action to contest the validity of the permits. The installation is located [illegible] from the company's Park Avenue north lot lines. It is designed primarily to handle heavy building materials; its present use is to load transit mix trucks with sand, stone, cement and water, which immediate

are then mixed to become concrete while the truck is enroute to the customer. The installation consists of: (1) five bins completely enclosed by sheet steel for the temporary storage of the various components of concrete, the bins being slightly less than 45 feet high; (2) two enclosed conveyors (one bucket, one belt) attached to the bins firmly by bolts, one conveyor being 57 feet high and the other 62 feet high. When it is necessary to load the bins, the components of concrete are carried from the Burlington Railroad tracks nearby through two underground conveyors to the enclosed loading conveyors, and then by them up to the bins. After a truck is driven beneath the bottom of the enclosed bins the truck is loaded through mechanical and electrical controls and the force of gravity. All of the bins and the two conveyors are enclosed. The installation also has a built-in hood, a retractable chute, and a dust collector, which devices cover the loading portion of the truck during the loading operation. An electric motor simultaneously sucks dust from this operation back into the enclosed bins. The bins are insulated and equipped with rubber bumpers. Rubber liners and stop flaps are also used. The company regularly oil sprays the area. A ten foot fence has been erected around the property. Trees have been planted along the lot line. And the structure has been painted an apparently acceptable color.

The defendant Keller-Heartt etc. Co.'s real estate is bounded on the north by the Chicago, Burlington and Quincy R.R. Co. tracks and on the south by Park Avenue. It is in the Industrial District under the village zoning ordinance, wherein, among other uses, these uses are permitted: building material storage yards, and light manufacturing and business establishments not otherwise herein provided for, none of which shall be of a nature

to create objectionable noise, odor, smoke, gas, fumes, or vapor. The property is (968') or 168', x 214' x 270'. It has been occupied by the company since 1929. Besides the presently involved installation there are located thereon an office building, lumber shed, numerous oil tanks, pump house, garage, and several small out buildings. The company has always been in the materials and fuel business and has stored thereon sand, stone, bagged cement, building materials, etc. The company was so engaged in such businesses thereon before any of the plaintiffs purchased their homes. It maintains some 20 trucks other than cement trucks to service its customers' needs. The plaintiffs' brief here indicates that they concur in believing that the use to which the property was put prior to the erection of the cement mix structure was proper under the zoning ordinance.

In the immediate neighborhood are a lumber company, a bow and arrow factory, a concrete products manufacturing company, a wire and metal products plant, and a milk bottling plant. About 60 trains per day are operated by the railroad on the north over three tracks. The lots immediately south and southwest of the company's property are vacant, except for some where a builder began a development of homes after the present cement mix plant was in operation, though some of those lots are not suited for any use because of constant flooding. Not far distant from this property are certain water towers of the Village itself which are more than 45 feet high, - in fact, about 120 feet high.

So far as alleged dust from the operation of the cement mix structure is concerned the plaintiffs' evidence was in some conflict, and their real estate appraiser said it did not give off any dust. A research and engineering chemist who specializes in the

study of air pollution and noise testified for the defendants as to standard tests he had made on the company's property for the emission of dust and said the structure did not add to the neighborhood's dust and was not a source of air pollution. So far as alleged noise is concerned the plaintiffs' evidence again was somewhat contradictory. The research and engineering chemist who testified for the defendants had also made certain standard tests for noise from the operation of the structure and in the neighborhood, and he said the operation was not offensive, was within tolerable limits, was less in intensity than most other neighborhood noises, and the frequency or pitch thereof was within proper limits.

With respect to any special damage to the plaintiffs, none of the plaintiffs themselves testified concerning any alleged damage. A real estate broker testified for the plaintiffs that he thought their damage was no greater than 5 to 7½%. That witness, however, was unfamiliar with the plaintiffs' properties, had made no investigation of sales in that or any comparable area, had never sold any real estate in the village, and did not know how the company's property was previously used, or how the cement mix plant works. Another real estate broker testified for the defendants. He had appraised and sold real estate in the village, and been in building activities there. He knew the area before the cement mix plant was built. He's seen it in operation. He'd made a sidewalk appraisal of all the plaintiffs' properties, and an analysis of sales in a comparable area in the village. He said the character of the industrial area had been established before the cement mix plant was built and its erection had no adverse effect on real estate values. He said the plaintiffs had not been damaged by the cement mix plant.

There were some 26 witnesses altogether, a lengthy stipulation, numerous exhibits, and the record consists of some 569 pages.

study of air pollution and noise established for the defendants as to stockyards; they had made on the company's property for the emission of dust and said the attorneys did not add to the neighborhood's dust and was not a source of air pollution. [illegible] alleged noise in connected the plaintiff's evidence [illegible] what contradictory. The research and [illegible] established for the defendants had also made a material [illegible] noise from the operation of the [illegible] and be said the operation was [illegible] liability, was less [illegible] and the frequency or pitch [illegible].

With respect to the [illegible] the plaintiffs [illegible] a real estate broker [illegible] which [illegible] was [illegible] was unfavorable with [illegible] tigation of sales [illegible] any real estate in the village, [illegible] property was [illegible] another real estate [illegible] appraised and sold real estate [illegible] ing activities there. He [illegible] was built. He's seen it in [illegible] of all the plaintiffs' properties, [illegible] a comparable area in the village. He said the character of the industrial area had been established before the [illegible] was built and its erection had no adverse effect on real estate values. He said the plaintiffs had not been damaged by the cement mix plant.

There were some 20 witnesses altogether, a lengthy argumentation, numerous exhibits, and the record consists of some 800 pages.

This case is not one where an owner of land is complaining of restrictions placed upon its use, but is a case in which other parties claim that the municipal authorities have wrongfully permitted a certain use on and of the property of someone else. Under such circumstances it has been held that for such a party to have any standing in a court of equity to complain about the use of another's property, he has the burden of proving that he has suffered a special damage by reason of such use which differs from that suffered by the general public: GARNER et al. v. COUNTY OF DUPAGE et al. (1956) 8 Ill. (2d) 155; BULLOCK et al. v. CITY OF EVANSTON et al. (1954) 5 Ill. (2d) 22. As was said in GARNER et al. v. COUNTY OF DUPAGE et al., p. 159: "If the rule were not applied to zoning cases in the nature of the one before us, harassing and vexatious suits by persons not aggrieved would most certainly ensue."

We have searched the brief of the plaintiffs and nowhere do we find they have urged any error as to the trial court's finding that the plaintiffs have not suffered special damage, or cited any authority in that regard. In the plaintiffs' brief here only one point is stated under "Points and Authorities", which is: "I. No waiver or estoppel may be relied upon by a mere indulgence or silent acquiescence where it does not appear that the other party understood that there was a waiver or that they relied thereon.", and only one citation of authority is given, which is: VILLAGE OF LAKE BLUFF v. DALITSCH et al. (1953) 415 Ill. 476. And in the "Argument" part of their brief here that one point so stated in the Points and Authorities is the only matter discussed and that single citation is not even referred to. The case cited does not relate to the matter of special damages of a party complaining of another's use of his own property. In fact, this language in that case, at p. 487, is pertinent here: "Other errors have been assigned on this

appeal, but they have not been argued in the briefs submitted to this Court. Consequently, these assignments are considered waived and not presented here for review." In the Argument part of their Brief here the plaintiffs appear to accede to the principle, above stated, as to the necessity of their establishing a special damage suffered by them, but all they say in support of their position is: "An unlawful and objectionable operation of a business upon property would certainly have an effect upon property within a reasonable distance of the offending property. That is so clear as to need no argument." We think the matter is not so clear here as to need no argument and no citation of authorities.

Supreme Court Rule 39, CH. 110 ILL. REV. STATS., 1959, par. 101.39, provides, as to an appellant's brief, that, in part, "The Points and Authorities shall consist of the propositions relied upon in support of the appeal with citation of authorities. * * ", and, "The Argument shall be limited to the points made and cases cited in the Points and Authorities, and in the sequence in which the points are made. A point made but not argued may be considered waived. * * * No alleged error or point not contained in the brief shall be raised afterwards, either by reply brief or in oral or printed argument or on petition for rehearing. * * * ". Appellate Court Rule 7, CH. 110 ILL. REV. STATS., 1959, par. 201.7, is to the same effect.

Upon appeal, every reasonable intendment not negatived by the record will be indulged in in support of the judgment or decree; error is never presumed by a reviewing court, but must be affirmatively shown by the record: UNION DRAINAGE DISTRICT etc. v. HAMILTON

(1945) 390 Ill. 487; PEOPLE ex rel. WEBER et al. v. RITSCHER et al. (1921) 301 Ill. 40. A decree is to be presumed correct, and one who seeks to reverse it carries the burden of showing that it is erroneous: MOLNER v. CARTEMOS et al. (1953) 415 Ill. 172.

We will not search the record to try to find possible error committed by a trial court; an appellant must urge any error of which he chooses to take advantage and must present argument in support thereof; in the absence of such urging and such argument the matter is waived and there is no possible error to be reviewed: ROBBINS v. MILLIKIN NATIONAL BANK etc. et al. (1948) 334 Ill. App. 190; FUGETT etc. v. MURRAY (1941) 311 Ill. App. 323; SCHIFF v. SCHIFF (1960) 25 Ill. App. (2) 157; HAAS v. BUICK MOTOR etc. (1959) 20 Ill. App. (2) 448; where the appellant ignores an essential point in his brief and argument we have no alternative but to affirm the judgment: ALLENSWORTH v. ALLENSWORTH (1960) 25 Ill. App. (2) 259.

We think that this disposes of this appeal, inasmuch as the plaintiffs in this case must, in all events, prove special damages. Their failure to assert and argue any error as to the trial court's finding of no special damages is fatal to this appeal. Having stated and argued no point in that respect as a proposition relied upon in support of the appeal and having cited no supporting authorities, the matter is considered waived. It is unnecessary, therefore, to discuss any other matters.

Even were that matter of special damages properly before us, we could not conclude that the decree in that respect is contrary to the manifest weight of the evidence or the law.

We, therefore, hold that the decree is correct, and it will be affirmed.

A F F I R M E D .

Wright, J. Concur

SPIVEY, P.J. Concurs

(1945) 390 111. 4071 [illegible]

(1921) 301 111. 40. [illegible]

who seeks to [illegible]

erroneous: [illegible]

We will not [illegible]

[illegible]

which he observed [illegible]

support thereof; [illegible]

the matter is [illegible]

[illegible]

110) [illegible]

[illegible] (1947) [illegible]

20 111. [illegible] (3) [illegible]

point is [illegible]

the judgment: [illegible]

207.

[illegible]

plaintiffs [illegible]

their claims [illegible]

[illegible]

[illegible]

upon in support of the special [illegible]

[illegible]

fore, to [illegible]

Even were that [illegible]

we could not conclude that the [illegible]

to the manifest weight of the [illegible]

We, therefore, hold that the [illegible]

be affirmed.

A F F I R M E D.

SPIVEY, P.J. concurs

No.II5I4 Publish Abstract Only Agenda No.9

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT, FIRST DIVISION

MAY TERM, A.D. 1961

PEARLINE TORRANCE, Plaintiff-Appellant vs CITY NATIONAL BANK OF ROCKFORD, a National Banking Association, Defendant- Appellee	Appeal from the Circuit Court of Winnebago County

SMITH, P.J.

Plaintiff filed her suit charging the defendant bank with libelling her in refusing to honor a check bearing her name as drawer in the sum of $20.00 and returning the same to A & P Food Market marked " insufficient funds." The trial court struck the complaint on motion and granted leave to the plaintiff to file an amended complaint within twenty days. None was ever filed. Eighty two days later the defendant filed its motion to dismiss the suit and for judgment in bar. Plaintiff then elected to stand on her her original complaint. An appropriate judgment in bar followed and this appeal is from that judgment.

The original record in this cause failed to show any election on the part of the plaintiff to stand on her original complaint although her brief states that such was her intention and that that was the reason for not filing an amended complaint. After all briefs were in and on the day before oral argument

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT, FIRST DIVISION

MAY TERM, A.D. 1964

FRANKLIN TORRANCE,	
Plaintiff-Appellee	Appeal from
vs.	Circuit Court of
CITY NATIONAL BANK OF WOODSTOCK, a National Banking Association, Defendant-Appellee	Winnebago County

SMITH, P.J.

Plaintiff filed her suit charging the defendant bank with libeling her in [illegible] to have a check bearing her name as drawer in the amount of $20.00 and return it to the payee to A & P Food Market marked "Insufficient Funds." The trial court struck the complaint on motion and granted leave to the plaintiff to file an amended complaint within twenty days. None was ever filed. Eighty two days later the defendant filed its motion to dismiss the suit and for judgment in bar. Plaintiff then elected to stand on her original complaint. An appropriate judgment in bar followed and this appeal is from that judgment.

The original record in this cause failed to show any election on the part of the plaintiff to stand on her original complaint although her brief states that such was her intention and that that was the reason for not filing an amended complaint. After all briefs were in and on the day before oral argument

in this Court plaintiff filed her motion in this Court to amend the record before us and attached thereto additional parts of the record and a report of trial proceedings duly certified by the court reporter and the clerk of the trial court. This motion we took with the case. The motion and the documents attached clearly show that the trial court did permit the plaintiff to elect to stand on her original complaint after failing to amend within the 20 days allowed by the trial court. The plaintiff sought by petition in the trial court to correct the record and submitted the report of trial proceedings to the trial judge for certification. The court denied the petition to correct the record and refused the certification. This was done on the theory that he was without jurisdiction to do either as the case and the record were then in this Court. The trial court labored under a misapprehension. The relief requested by the plaintiff was in keeping with and not antagonistic to the principles pronounced by this Court in County Board of Trustees v. Bendt, 30 Ill. App. 2d 329, 174 N.E.2d 404. While we could,with propriety, remand the case to the trial court with directions to allow the plaintiffs petition and supply us with a complete and correct picture, properly authenticated, we are of the opinion that the record before us is an appropriate place for us to exercise the power conferred on us by Chapt. 110 Sec. 92 (c) C.P.A.,in our discretion, to " order or permit the record to be amended by correcting errors or adding matters which should have been included." (Ill. Rev. Stat. Chapt. 110 Sec. 92 (c). The truth of the matters set forth in the motion by the plaintiff and the documents attached are not attacked or denied by the appellee. In this state of the record we will allow the motion and treat the record as properly amended and before us. In so doing we avoid judicial wheel spinning without injustice to the appellee

in this Court plaintiff filed her motion in this Court to amend the record before us and attached thereto additional parts of the record and a report of trial proceedings duly certified by the court reporter and the clerk of the trial court. This motion we took with the case. The motion and the documents attached clearly show that the trial court did permit the plaintiff to elect to stand on her original complaint after failing to amend within the 20 days allowed by the trial court. The plaintiff sought by petition in the trial court to correct the record and submitted the report of trial proceedings to the trial judge for certification. The court denied the petition to correct the record and refused the certification. This was done on the theory that he was without jurisdiction to do either as the case and the record were then in this Court. The trial court labored under a misapprehension. The relief requested by the plaintiff was in keeping with and not antagonistic to the principles pronounced by this Court in County Board of Trustees v. Bendt, 30 Ill. App. 2d 329, 174 N.E.2d 604. While we could, with propriety, remand the case to the trial court with directions to allow the plaintiffs petition and supply us with a complete and correct picture, properly authenticated, we are of the opinion that the record before us is an appropriate place for us to exercise the power conferred on us by Chapt. 110 Sec. 92 (c) C.P.A., in our discretion, to " order or permit the record to be amended by correcting errors or adding matters which should have been included." (Ill. Rev. Stat. Chapt. 110 Sec. 92 (c). The truth of the matters set forth in the motion by the plaintiff and the documents attached are not attacked or denied by the appellee. In this state of the record we will allow the motion and treat the record as properly amended and before us. In so doing we avoid judicial wheel spinning without injustice to the appellee

or loss to it of any substantial rights.

Plaintiff's contention that the trial court abused its discretion in dismissing the suit and entering judgment in bar is without merit. Plaintiff was not entitled as a matter of right to file an amended complaint. Daviditis v. National Bank of Mattoon, 6 Ill. App. 2d 286, I27 N.E.2d 462. Where a complaint is dismissed on motion, the court properly imposed a time limit in granting leave to amend and, in the absence of an amendment within the specified time or a requested extension of time, the suit is properly dismissed. Coatie v. Kidd, I7 Ill. App. 2d 289, I49 N.E.2d 646. This record is barren of any request on the part of the plaintiff for additional time in which to file an amended complaint. A trial court cannot be successfully charged with an abuse of discretion which it was never called upon to exercise.

Furthermore, " a court may consider the ultimate efficacy of a claim in passing upon a motion for leave to amend or in considering a motion to dismiss." Deasey v. City of Chicago, 412 Ill. 151, 1o5 N.E.2d 727. The defendant's motion to dismiss charges that the plaintiff lost her bill fold and identification cards; that a third party used them to establish an account with the defendant bank and issued the check upon which this suit is founded; that the plaintiff never did have an account with the defendant bank or do any business there; and that the plaintiff advised the bank after the return of the check that she was not the person who opened the account in question. In a pleading denominated " motion in opposition to the motion to strike," plaintiff asserts that this new matter sets up no defense, is incompetent, irrelevant and immaterial and is not supported by affidavit. In the absence of a motion to strike, this new matter was properly considered

or loss to it of any substantial rights.

Plaintiff's contention that the trial court abused its discretion in dismissing the suit and entering judgment in bar is without merit. Plaintiff was not entitled as a matter of right to file an amended complaint. Davidtis v. National Bank of Mattoon, 6 Ill. App. 2d 226, 127 N.E.2d 622. Where a complaint is dismissed on motion, the court properly imposed a time limit in granting leave to amend and, in the absence of an amendment within the specified time or a requested extension of time, the suit is properly dismissed. Costic v. Kido, 17 Ill. App. 2d 289, 149 N.E.2d 646. This record is barren of any request on the part of the plaintiff for additional time in which to file an amended complaint. A trial court cannot be successfully charged with an abuse of discretion which it was never called upon to exercise.

Furthermore, " a court may consider the ultimate efficacy of a claim in passing upon a motion for leave to amend or in considering a motion to dismiss." Deasey v. City of Chicago, 412 Ill. 151, 105 N.E.2d 727. The defendant's motion to dismiss charges that the plaintiff lost her bill fold and identification cards;that a third party used them to establish an account with the defendant bank and issued the check upon which this suit is founded; that the plaintiff never did have an account with the defendant bank or do any business there; and that the plaintiff advised the bank after the return of the check that she was not the person who opened the account in question. In a pleading denominated " motion in opposition to the motion to strike," plaintiff asserts that this new matter sets up no defense, is incompetent, irrelevant and immaterial and is not supported by affidavit. In the absence of a motion to strike, this new matter was properly considered

by the trial court in determining the ultimate efficacy of this claim. Klemm v. Trustees of American Red Cross, 20 Ill, App. 2d 482, I56 N.E. 2d 258.

It is thus readily apparent from this record that the bank never did publish or circulate any statement about this plaintiff but rather against the unknown third person who made the deposit and issued the check. How the defendant bank could have intended to charge this plaintiff with the commission of a crime or maliciously intended to injure her and destroy her good name, credit and reputation as alleged in the complaint is, to say the least, obscure. The funds on deposit were not hers; the returned check was not hers, and the"insufficient funds" advice slip to the A & P. Food Market did not refer to her. Plaintiff was an utter stranger to the defendant bank. It is crystal clear that the document relied on as libelous was not issued " of andconcerning the plaintiff". In the only case to which our attention was drawn by the briefs it appears that no cause of action is stated against the defendant in the absencee of allegations and proof that the bank had on deposit unencumbered funds belonging to the plaintiff out of which checks drawn by the plaintiff should have been paid and the bank, through mistake or other inexcusable conduct, refused to honor the same. Hanna v. Drovers National Bank, I94 Ill.252,62 N.E. 2d 558. Neither the allegations of the complaint nor the circumstances shown by this record approximate these requirements.

Practical and common sense considerations raise an insuperable and impenetrable barrier to the statement of a cause of action on the facts in this record. Courts are not and should not be oblivious to the ordinary occurences of a complex society.

by the trial court in determining the ultimate efficacy of this claim. Klemm v. Trustees of American Red Cross, 20 Ill. App. 2d 482, 156 N.E. 2d 283.

It is thus readily apparent from this record that the bank never did publish or circulate any statement about this plaintiff but rather against the unknown fairy person who made the deposit and issued the check. How the defendant bank could have intended to charge this plaintiff with the commission of a crime or maliciously intended to injure her and destroy her good name, credit and reputation as alleged in the complaint is, to say the least, obscure. The funds on deposit were not hers; the returned check was not hers, and the"insufficient funds" advice slip to the A & P. Food Market did not refer to her. Plaintiff was an utter stranger to the defendant bank. It is crystal clear that the document relied on as libelous was not issued " of andconcerning the plaintiff".

In the only case to which our attention was drawn by the briefs it appears that no cause of action is stated against the defendant in the absence of allegations and proof that the bank had on deposit unnumbered funds belonging to the plaintiff out of which checks drawn by the plaintiff should have been paid and the bank, through mistake or other inexcusable conduct, refused to honor the same. Hanna v. Provers National Bank, 194 Ill.232,62 N.E. 2d 555. Neither the allegations of the complaint nor the circumstances shown by this record approximate these requirements.

Practical and common sense considerations raise an insuperable and impenetrable barrier to the statement of a cause of action on the facts in this record. Courts are not and should not be oblivious to the ordinary occurrences of a complex society.

The return of a check for want of sufficient funds without more factually is a delicate foundation upon which to construct a suit for libel. It is a common practice, albeit, perhaps too common. It would be a perversion of realism to believe that the bank intended to charge the drawer of the check with a violation of the Criminal Code or that the recipient of the returned check would interpret the advice slip as charging the drawer with a criminal act. It was just a simple statement that there were insufficient funds to pay the check. It does not per se charge the drawer with a criminal act. Geered to the morals and understanding of the market place it falls far short of directly or by implication charging the drawer with the issuance of the check " with the intent to defraud". Thus shorn of any iniquity, the statement is innocuous and devoid of any libellous characteristics.

Perceiving no error in the action of the Circuit Court of Winnebago County in dismissing this complaint and in entering its judgment in bar, it's judgment should be, and it is, hereby affirmed.

Affirmed.

Dove, J and McNeal, J, concur.

The return of a check for want of sufficient funds without more factually is a delicate foundation upon which to construct a suit for libel. It is a common practice, albeit, perhaps too common. It would be a perversion of reason to believe that the bank intended to charge the drawer of the check with a violation of the Criminal Code or that the recipient of the returned check would interpret the advice slip as charging the drawer with a criminal act. It was just a simple statement that there were insufficient funds to pay the check. It does not per se charge the drawer with a criminal act. Geared to the morals and understanding of the market place it falls far short of directly or by implication charging the drawer with the issuance of the check " with the intent to defraud". Thus shorn of any indirectly, the statement is innocuous and devoid of any libellous characteristics.

Perceiving no error in the action of the Circuit Court of Winnebago County in dismissing this complaint and in entering its judgment in bar, it's judgment should be, and it is, hereby affirmed.

Affirmed.

Dove, J and McNeal, J, concur.

Abstract

General No. 11520 Agenda No. 14.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT - FIRST DIVISION

May Term, A.D., 1961

SIDNEY BRUCE, HOMER CUNNINGHAM, JAMES ARNOLD, WILLIAM H. FAMBRO, Trustees of the Second Baptist Church of Freeport, Illinois, Plaintiffs-Appellants,	Appeal from
vs.	Circuit Court of
ROBERT HUNTER, CLARA HUNTER, GEORGE ERVIN, BESSIE ERVIN, RICHARD WALLACE, SUSIE WALLACE, LOUIS GOSSETT, Jr., OSCAR MORGAN, MAMIE FARR, ELLA SLAUGHTER, JOHN BRUMFIELD, ROSIE BRUMFIELD and LINA NESBY, Defendants-Appellees.	Stephenson County.

DOVE, J.

This appeal involves a controversy between two factions of the Second Baptist Church of Freeport, Illinois. The plaintiffs in this litigation are the trustees of this church who were elected trustees, for a period of one year, at the regular election held for the purpose of electing trustees on December 5, 1958. The defendants, Robert Hunter, Richard Wallace, Louis Gossett, Jr., and Ella Slaughter, are four of the five trustees of the church who were elected trustees on October 10, 1960. Harry Johnson is the fifth trustee elected in 1960 but was not made a defendant. The other defendants are members of the congregation who are part of a group opposing the plaintiffs.

General No. 11,[illegible] Agenda No. 1.

In the

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL - FIRST DISTRICT

May Term, A.D. 1961

ELMER MUNDT, ROLLA GUNDLACH, JAMES ARNOLD, JULIAN H. FLAMM, Trustees of the Second Baptist Church of Freeport, Illinois, Plaintiffs-Appellants,	Appeal from a Circuit Court of Stephenson County.
vs.	
JEANNE HUNTER, ELMA HUNTER, GEORGE KEYER, ALBERT [illegible], RICHARD WALLACE, LOUIS GOSSETT, Jr., ORCAN HUNTER, MARIE [illegible], ELLA [illegible], JOHN [illegible], [illegible] BRIDGETT [illegible] and ELMA [illegible], Defendants-Appellees.	

NOTE, 1.

This appeal involves a controversy between the Trustees of the Second Baptist Church of Freeport, Illinois. The plaintiffs in this litigation are the trustees of this church who were elected trustees, for a period of one year, at the regular election held for the purpose of electing trustees on December 3, 1960. The defendants, Albert Hunter, Richard Wallace, Louis Gossett, Jr., and Ella Langston, are four of the five trustees of the church who were elected trustees on October 30, 1960. Harry Johnson is the fifth trustee elected in 1960 but was not made a defendant. The other defendants are members of the congregation who are part of a group opposing the plaintiffs.

In their amended complaint, filed September 16, 1960, it was alleged that the plaintiffs were duly elected trustees of the Second Baptist Church of Freeport for the period of one year at an election held in accordance with the rules and orders of the church, held on December 5, 1958; that they took office in December, 1958, were duly installed as such trustees and still hold office; that plaintiff, William H. Fambro in addition to holding the office of trustee, is the pastor of said church; that the trustees are the owners of a described tract of land in Crocker's Addition to the City of Freeport; that a duly elected building committee of said church entered into a contract for the erection of a new church upon said premises but that the new church has not been completed and charges that the defendants, without the consent of the building committee, the trustees or the pastor have takenpossession of the premises and are holding church services in the new church building.

The amended complaint further alleged that by the rules and regulations of the Baptist Church Directory the defendants are without the authority, right, or power to enter into and upon the premises of the church without the consent of said trustees of the church or without the consent of its pastor.

The prayer of the amended petition was that the court enjoin and restrain the defendants from (1) continuing to use the church premises; (2) from using the name, "Second Baptist Church of Freeport" and (3) from representing themselves as having any official or non-official connection with said church. The amended complaint also prayed for a monetary award for damages and expenses which have accrued to plaintiffs by reason of defendant's unlawful acts and for an order requiring the defendants to turn over to the plaintiffs the possession and control of all the personal property, including bank accounts, records and books belonging to the church as well as the real estate described in the amended complaint.

In their amended complaint, filed September 16, 1960, it was alleged that the plaintiffs were duly elected trustees of the second Baptist Church of Freeport for the period of one year at an election held in accordance with the rules and orders of the church, held on December 5, 1959; that they took office in December, 1959; were duly installed as such trustees and still hold office; that plaintiff, William H. Fambro in addition to holding the office of trustee, is the pastor of said church; that the trustees are the owners of a described tract of land in Brazoria County in the City of Freeport; that a duly elected building committee of said church entered into a contract for the erection of a new church upon said premises but that the new church has not been completed and charges that the defendants, without the consent of the building committee, the trustees or the pastor have taken possession of the premises and are holding church services in the new church building.

The amended complaint further alleged that by the rules and regulations of the Baptist Church Directory the defendants are without the authority, right, or power to enter into and upon the premises of the church without the consent of said trustees of the church and not the consent of the pastor.

The prayer of the amended petition was that the court enjoin and restrain the defendants from (1) continuing to use the church premises; (2) from using the name, "Second Baptist Church of Freeport" and (3) from representing themselves as having any official or non-official connection with said church. The amended complaint also prayed for a monetary award for damages and expenses which have accrued to plaintiffs by reason of defendant's unlawful acts and for an order requiring the defendants to turn over to the plaintiffs the possession and control of all the personal property, including bank accounts, records and books belonging to the church as well as the real estate described in the amended complaint.

The defendants answered the amended complaint denying every allegation thereof. As a separate defense it was averred that the Second Baptist Church of Freeport, Illinois, was a duly existing religious corporation organized on October 11, 1960, in accordance with the statutes of the State of Illinois, and that the Defendants, Robert Hunter, Richard Wallace, Louis Gossett, Jr., and Ella Slaughter, together with the said Henry Johnson, were the duly elected, qualified, and acting trustees of said church. With their answer, the defendants filed a counterclaim in which they averred that the above five named persons were the duly qualified and acting trustees of the church; that the Second Baptist Church of Freeport, Illinois, was the owner of all the real and personal property formerly held by the association known as Second Baptist Church of Freeport, Illinois; that the plaintiffs had held possession of said real and personal property without authority so to do and that plaintiff, William H. Fambro, claimed to be one of the trustees of the church and the pastor thereof but his claim to such office was illegal and unauthorized.

The prayer of the counterclaim was that the plaintiffs be restrained and enjoined from using the church property, real or personal; that they be restrained from representing themselves as officers of the church; that William H. Fambro be restrained from representing himself to be the pastor of the church and that a mandatory injunction issue requiring plaintiffs to turn over possession and control of all of the personal property and books and records of the church and that they be restrained from representing themselves as having any official connection with said church.

The cause was heard by the chancellor in open court resulting in a decree dismissing the original complaint for want of equity and granting counterclaimants relief under their counterclaim. The decree enjoined the plaintiffs from representing themselves to be the trustees of the church, restrained, William H. Fambro from representing himself to be the pastor

The defendants answered the amended complaint denying every allegation thereof. As a separate defense it was averred that the second Baptist Church of Freeport, Illinois, was a duly existing religious corporation organized on October 11, 1906, in accordance with the statutes of the State of Illinois, and that the defendants, Frank Tucker, Roland Wallace, Louis Bassett, Sr., and Ella Clougherty, together with the said Henry Johnson, were the duly elected, qualified, and acting trustees of said church. With their answer, the defendants filed a counterclaim in which they averred that the second Baptist Church of Freeport, Illinois, was the owner in fee and possessed of the real and personal property formerly held by the association known as the second Baptist Church of Freeport, Illinois; that the defendants and each of them were the properly elected and acting trustees of the church; that the plaintiff, William L. Franks, claimed to be one of the trustees of the church and the pastor thereof but his claim to such office was illegal and unauthorized.

The prayer of the counterclaim was that the plaintiff be restrained and enjoined from using the church property, and be prevented that they be restrained from representing themselves as officers of the church; that William L. Franks be restrained from representing himself to be the pastor of the church and that a mandatory injunction issue requiring plaintiff to turn over possession and control of all of the personal property and books and records of the church and that they be restrained from representing themselves as having any official connection with said church.

The cause was heard by the chancellor in open court resulting in a decree dismissing the original complaint for want of equity and granting counterclaimants relief under their counterclaim. The decree enjoined the plaintiff from representing himself to be the trustee of the church, restrained, William L. Franks from representing himself to be the pastor

of the church, awarding him the sum of $390.00 as the salary due him at the time of his dismissal, enjoining the plaintiffs from using the name of Second Baptist Church of Freeport, Illinois and ordering and directing the plaintiffs to turn over to the Second Baptist Church of Freeport, all of the property belonging to the church which they had in their possession. To reverse this decree plaintiffs appeal.

The record discloses that in 1957 and prior thereto, the Second Baptist Church of Freeport, Illinois, was an unincorporated church organization. In 1957 the members decided to build a new church building and selected a building committee of three members, Richard Wallace, Lina Nesby and Frank Hicks, who entered into a contract with Bill J. Copeland of Miracle Builders of Wheaton, Illinois, to build a new church; that William H. Fambro became pastor of the church on February 28, 1953, and continued to act as such pastor until this controversy arose. Some friction between Mr. Fambro and the building committee arose shortly after the commencement of the erection of the new building and the charge was made before the congregation by Reverend Fambro that the building committee misappropriated funds of the church.

It also appears that Mr. Fambro was unable to get along with the church contractor, Mr. Copeland. The situation became so disagreeable, that in July, 1958, Fambro submitted his resignation as pastor. A meeting was held pertaining to his resignation on July 9, 1958, but no action was taken concerning it and the matter was continued to an adjourned meeting held on July 16, 1958. Mr. Fambro was present at this meeting of July 9 and made no objection to holding an adjourned meeting on July 16 to further consider his resignation. On July 13, 1957 Reverend Ervin, the assistant pastor, announced from the pulpit that the adjourned meeting would be held on July 16, 1958. On Tuesday, July 15, Fambro, through some circulars, sought to cancel the adjourned meeting set for July 16 and to

of the church, awarding him the sum of $290.00 as the salary due him at the time of his dismissal, enjoining the plaintiffs from using the name of Second Baptist Church of Freeport, Illinois and ordering and directing the plaintiffs to turn over to the Second Baptist Church of Freeport, all of the property belonging to the church which they had in their possession. To reverse this decree plaintiffs appeal.

The record discloses that in 1957 and prior thereto, the Second Baptist Church of Freeport, Illinois, was an unincorporated church organization. In 1957 the members decided to build a new church building and selected a building committee of three members, Howard Ballance, Lina Hardy and Frank Hicks, who entered into a contract with Bill L. Copeland of Lincoln Building of Rockford, Illinois, to build a new church; that William H. Rambo became pastor of the church on February 16, 1958, and continued to act as such pastor until this controversy arose. Some friction between Mr. Rambo and the building committee arose shortly after the commencement of the erection of the new building and the charge was made before the congregation by Reverend Rambo that the building committee misappropriated funds of the church.

It also appears that Mr. Rambo was unable to get along with the church contractor, Mr. Copeland. The situation became so disagreeable, that in July, 1958, Rambo submitted his resignation as pastor. A meeting was held pertaining to his resignation on July 9, 1958, but no action was taken concerning it and the matter was continued to an adjourned meeting held on July 16, 1958. Mr. Rambo was present at this meeting of July 9 and made no objection to holding an adjourned meeting on July 16 to further consider his resignation. On July 15, 1958 Reverend Levin, the assistant pastor, announced from the pulpit that the adjourned meeting would be held on July 16, 1958. On Tuesday, July 15, Rambo, through some circulars, sought to cancel the adjourned meeting set for July 16 and to

withdraw his resignation but the adjourned meeting was held on July 16, 1958, as scheduled, and at this meeting the congregation declared the pulpit vacant. The pastor was thereafter tendered a check for six-weeks salary amounting to $390.00 but Reverend Faubro refused to accept the check.

Commencing in September, 1958, appellees acted as officers of the church in completing the building of the new church, and a year later, in September, 1959, the new church building was opened to all the members. Reverend Faubro, however, was advised by appellees that he could not act as the pastor of the church and that appellants would not be recognized as trustees. This litigation ensued.

Section 170 of Chapter 32, Ill. Rev. St. 1959 provides: "Upon the incorporation of any congregation, church or society, all real and personal property held by any person or trustee for the use of the members thereof, shall immediately vest in such corporation and be subject to its control, and may be used, mortgaged, sold and conveyed the same as if it had been conveyed to such corporation by deed; ———". The record in the instant case shows that appellees complied with the provisions of this statute with reference to incorporating the Second Baptist Church of Freeport. Appellants do not contend otherwise. Written notice of the intent to incorporate was given to all members of the church. An organization meeting was held. The proper affidavit to incorporate the church as required by statute was made and filed and trustees were elected by the congregation. Upon the incorporation of the church all of the property of the church real and personal passed to the defendant trustees by virtue of the provisions of the statute. (Happy vs. Morton, 33 Ill. 398, 413; Brunnermeyer vs. Buhre, 32 Ill. 183, 189).

The record also shows a sufficient acceptance, if required, of the resignation of Reverend Fambro. In his letter of July 9, 1958, addressed to "The Second Baptist Church, Freeport, Illinois," Reverend Fambro, stated that he had been their pastor for more than five years and became such by their free vote; that from his point of view it was desirable that his resignation be accepted in the same attitude of Christian charity which prompted his call in the first place; that consciously or unconsciously the membership had rejected his leadership and that a pastor without a dedicated group of followers was powerless to render any help. His letter then continued: "This building program that we have entered into will demand a spirited and forceful leadership a kind that is not possible under present conditions. And I am convinced that you are not ready to change the present status quo. Therefore, July 15, 1958 I served notice that my present position as pastor was untenable, of no service to God and his cause.----------It is impossible for me to give you the leadership I am capable of giving under present conditions. Therefore rather than continue the present stale-mate, I hereby tender my resignation." There is some conflict in the evidence whether the membership after receiving this communication declared the pulpit vacant. On July 14, 1958, however, Reverend Fambro wrote Mr. and Mrs. Richard Wallace, two of the appellees that if $500.00 was paid to him in a bankers certified check by 10 o'clock p.m. July 15, 1958 he would relinquish his claim to the pulpit as of July 30, 1958.

We have not attempted to make an extended discussion or review of the testimony given at the hearing before the Chancellor. It is apparent from the record that the two groups or factions engaged in this controversy have substantial differences and that the membership of this church is divided in connection with the leadership of Reverend Fambro. The present

The record also shows a sufficient acceptance, if required, of the resignation of Reverend Fenton. In his letter of July 7, 1958, addressed to "The [illegible] Baptist Church, [illegible], Illinois," Reverend Fenton, stated that he had been their pastor for more than [illegible] years and became such by their free votes; that from his point of view it was desirable that his resignation be accepted in the true spirit of Christian charity which prompted his call in the first place; that consciously or unconsciously the membership had rejected his leadership and that a pastor without a dedicated group of followers can not render the service required. His letter then continues: "This indicates you are that we have entered into what looks like a spiritual and financial deadlock a thing that is not healthy under present conditions. And I am convinced that you are not ready to change the present state of affairs. Therefore, July 15, 1958 I must declare that my present position as pastor was untenable, and unworkable. Since this is the case——— it is impossible for me to give you the leadership I am capable of giving under present conditions. Therefore rather than continue the present stalemate, I hereby tender my resignation." There is some conflict in the evidence whether the membership after receiving this communication declared the pulpit vacant. On July 14, 1958, Reverend Fenton informed Mr. and Mrs. Richard Wallace, two of the appellees that if $500.00 was paid to him in a bankers certified check by 10 o'clock p.m. July 15, 1958 he would relinquish his claim to the pulpit as of July 20, 1958.

We have not attempted to make an extended discussion or review of the testimony given at the hearing before the Chancellor. It is apparent from the record that the two groups or factions engaged in this controversy have substantial differences and that the membership of this church is divided in connection with the leadership of Reverend Fenton. The present

trustees, however, were chosen in accordance with the provisions of the statute of this state and the rules of this church and they are maintaining and using the church property for the benefit of all the members to the best of their ability and under difficult circumstances. We fail to see where any member of the church has been deprived of any substantial right in the church property.

Where members of a church have not been deprived of substantial rights in church property, they cannot claim that the church property belongs to any particular group or faction of the church. (Wright vs. Smith, 4 Ill. App. 2d 470, 475-476). There is no showing in this record that appellees have broken away from the tenets or teachings or discipline of the church as was insisted in the case in Little Grove Church vs. Todd, 373 Ill. 387 and in Stallings vs. Finney, 287 Ill. 1-5. There is nothing in this record to show that the faith or doctrine of appellees is any different from that of appellants. All the evidence shows is that all the parties hereto are members of a different faction in the same church. As said in Little Grove Church v. Todd, 373 Ill. 387, p. 392: "Courts of equity do not interfere on account of inaccuracies of expression or inappropriate figures of speech, nor for departures from mathematical exactness in language employed in inculcating the tenents preached. There must be a real substantial departure from the purpose of the trust, such as amounts to a perversion of it, in order to authorize the exercise of equitable jurisdiction in granting relief. Happy vs. Morton, 33 Ill. 398".

The allegations of the counterclaim are sustained by the evidence found in this record and the decree appealed from must therefore be affirmed.

Decree Affirmed.

SMITH, P.J. CONCURS.

McNEAL J. CONCURS.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10363 | Agenda No. 4

Albert Tomblin, Plaintiff-Appellee, vs. Charles Dobbins and William Beachler, Defendants. \# \# \# Charles Dobbins, Defendant-Appellant.	Appeal from the Circuit Court of Tazewell County

CARROLL, J.

This action was brought to recover damages for personal injuries sustained by plaintiff, Albert Tomblin, as the result of an automobile collision. The plaintiff was a passenger in an automobile operated by defendant, Charles Dobbins. The suit was brought against Dobbins and William Beachler, the operator of the car which collided with the one operated by Dobbins. The jury returned a verdict for the plaintiff against both defendants and assessed plaintiff's damages at $45,000. Defendant Dobbins' post trial motion was overruled and judgment was entered on the verdict. This appeal is taken only by defendant Dobbins, who will be referred to herein as the defendant.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10363 | Agenda No. 4

Albert Tomblin,

Plaintiff-Appellee,

vs.

Charles Dobbins and William Beckler,

Defendants.

Charles Dobbins,

Defendant-Appellant.

Appeal from the Circuit Court of Tazewell County

CARROLL, J.

This action was brought to recover damages for personal injuries sustained by plaintiff, Albert Tomblin, as the result of an automobile collision. The plaintiff was a passenger in an automobile operated by defendant, Charles Dobbins. The suit was brought against Dobbins and William Beckler, the operator of the car which collided with the one operated by Dobbins. The jury returned a verdict for the plaintiff against both defendants and assessed plaintiff's damages at $15,000. Defendant Dobbins' post trial motion was overruled and judgment was entered on the verdict. This appeal is taken only by defendant Dobbins, who will be referred to herein as the defendant.

The complaint charges defendant with negligence in that he allegedly drove at an unreasonable speed; in that he failed to keep his automobile under proper control; that he failed to keep a proper look out to the rear; that he failed to give an appropriate signal upon decreasing his speed; that he brought his automobile to a sudden stop without regard to the proximity of the automobile following. The complaint charges Beachler with failing to keep a proper look out ahead; with failing to keep his automobile under proper control and with driving at an unreasonably high rate of speed. Issues were joined on these allegations.

The collision occurred on March 27, 1959, at approximately 7 o'clock A. M. at Routes 150 and 116 in Tazewell County, Illinois. This is a T intersection with Route 116 extending north and south and Route 150 extending west from Route 116. North of the intersection, Route 116 is approximately 50 feet wide. All traffic approaching the intersection is controlled by a traffic light system. Plaintiff and defendant and another passenger, Vester Martin, worked at the Caterpillar Tractor Co. at Peoria. Transportation was supplied to plaintiff by defendant in consideration of payment of $2.50 per week. The trio were on their way to work at the time of the collision. The pavement was damp as the result of a light snow fall, which fell during the night preceding. It was cloudy, but visibility was good in all directions. Traffic was light and the defendant was driving his automobile in a

The complaint charges defendant with negligence in that he allegedly drove at an unreasonable speed; in that he failed to keep his automobile under proper control; that he failed to keep a proper look out to the rear; that he failed to give an appropriate signal upon decreasing his speed; that he brought his automobile to a sudden stop without regard to the proximity of the automobile following. The complaint charges Beechler with failing to keep a proper look out ahead; with failing to keep his automobile under proper control and with driving at an unreasonably high rate of speed. Issues were joined on these allegations.

The collision occurred on March 27, 1957, at approximately 7 o'clock a. M. at Route 150 and 116 in Tazewell County, Illinois. This is a T intersection with Route 116 extending north and south and Route 150 extending west from Route 116. North of the intersection, Route 116 is approximately 30 feet wide. All traffic approaching the intersection is controlled by a traffic light system. Plaintiff and defendant and another passenger, Vaughn Martin, worked at the Caterpillar Tractor Co. at Peoria. Transportation was supplied to plaintiff by defendant in consideration of payment of $2.50 per week. The trio were on their way to work at the time of the collision. The pavement was damp as the result of a light snow fall, which fell during the night preceding. It was cloudy, but visibility was good in all directions. Traffic was light and the defendant was driving his automobile in a

southerly direction along Route 116. The plaintiff, Tomblin, was seated to the defendant's right on the front seat. The other passenger, Martin, occupied the back seat of the automobile. Defendant's car was a 1956 Plymouth and was equipped with power brakes. At the time defendant was approximately one-quarter mile north of the intersection, he was traveling 55 or 60 miles per hour. At that time the defendant observed an automobile to his rear traveling in the same direction which was following at an estimated 150 to 200 feet, but whose speed was not calculated or estimated at that time. The defendant never again looked in his rear view mirror to observe the course of the following car. This following car was the one operated by Beachler.

The plaintiff testified that when the defendant's car reached a point about 2 car lengths north of the intersection, the traffic control light turned from green to yellow and that defendant was driving at a speed of about 45 miles per hour. Plaintiff also testified that upon the traffic lights changing to yellow, defendant immediately applied his brakes and that as the car stopped, it was struck from behind by the Beachler car. Defendant testified that the light changed when he was approximately 12 feet from the traffic light and at that time his speed was about 15 miles per hour and that immediately upon stopping his car, it was struck from the rear. Beachler testified that at the time the light changed to yellow, the defendant's car was 10 or 12 feet from the intersection,

southerly direction along Route 116. The plaintiff, Tomblin, was seated to the defendant's right on the front seat. The other passenger, Martin, occupied the back seat of the automobile. Defendant's car was a 1956 Plymouth and was equipped with power brakes. At the time defendant was approximately one-quarter mile north of the intersection, he was travelling 55 or 60 miles per hour. At that time the defendant observed an automobile to his rear travelling in the same direction which was following at an estimated 150 to 200 feet, but whose speed was not calculated or estimated at that time. The defendant never again looked in his rear view mirror to observe the course of the following car. This following car was the one operated by Beechler.

The plaintiff testified that when the defendant's car reached a point about 2 car lengths north of the intersection, the traffic control light turned from green to yellow and that defendant was driving at a speed of about 45 miles per hour. Plaintiff also testified that upon the traffic light changing to yellow, defendant immediately applied his brakes and that as the car stopped, it was struck from behind by the Beechler car. Defendant testified that the light changed when he was approximately 12 feet from the traffic light and at that time his speed was about 15 miles per hour and that immediately upon stopping his car, it was struck from the rear. Beechler testified that at the time the light changed to yellow, the defendant's car was 10 or 12 feet from the intersection,

and that he, Beachler, was 2 car lengths to the rear. Beachler estimated defendant's speed at that time to be 15 to 20 miles per hour and his own speed at 5 to 10 miles per hour. Beachler said he had been watching the Dobbins car for a signal, but observed none until Dobbins brought his car to a sudden stop and that he was then unable to stop his automobile in time to avoid colliding with the rear of the Dobbins vehicle. The witness, Martin, was called by Beachler, and testified that Dobbins was about 28 feet from the traffic signal when it changed to yellow and that at that time he was traveling about 20 miles per hour. He stated that the defendant braked the car gradually and that after he had stopped the collision occurred. Upon cross-examination, the witness admitted having made a prior statement to the effect that Dobbins had braked his car suddenly, but that he had been driving at about 60 miles per hour, and that immediately upon braking, was struck from the rear by the Beachler car.

The rear of Dobbins's car and the front of the Beachler automobile were badly damaged. Following the collision, the plaintiff was taken by ambulance to a hospital for emergency care. Plaintiff testified that he experienced numbness in his right arm and on the right side of his face. Traction was applied to his neck and plaintiff said he experienced severe pain. He remained in the hospital about 2 weeks, during which time he received medications to control the pain. He returned to the hospital on April 22 and stayed for about 3 months, during which time he received therapy and medication and experienced increasing paralysis and pain. He

and that he, Beaudler, was 2 car lengths to the rear. Beaudler estimated defendant's speed at that time to be 15 to 20 miles per hour and his own speed at 5 to 10 miles per hour. Beaudler said he had been watching the Dobbins car for a while, but observed none until Dobbins brought his car to a sudden stop and that he was then unable to stop his automobile in time to avoid colliding with the rear of the Dobbins vehicle. The witness, Martin, was called by Beaudler, and testified that Dobbins was about 25 feet from the traffic signal when it changed to yellow and that at that time he was travelling about 20 miles per hour. He stated that the defendant braked the car gradually and that after he had stopped the collision occurred. Upon cross-examination the witness admitted having made a prior statement to the effect that Dobbins had braked his car suddenly, and that he had been driving at about 30 miles per hour, and that immediately upon braking, was struck from the rear by the Beaudler car.

The rear of Dobbins's car and the front of the Beaudler automobile were badly damaged. Following the collision, the plaintiff was taken by ambulance to a hospital for emergency care. Plaintiff testified that he experienced numbness in his right arm and on the right side of his face. Traction was applied to his neck and plaintiff said he experienced severe pain. He remained in the hospital about 2 weeks, during which time he received medications to control the pain. He returned to the hospital on April 22 and stayed for about 3 months, during which time he received therapy and medication and experienced increasing paralysis and pain. He

returned again to the hospital in November and stayed for about 2 months, during which time various treatments were administered. At the time of the trial plaintiff still wore a brace on his neck. He stated that prior to the collision he weighed 169 pounds and at the time of the trial he weighed 127 pounds. He stated he never returned to his employment. The attending physician testified to his treatment and stated that in his opinion the plaintiff's complaint was attributable to the trauma sustained in the collision. He further stated that in his opinion the plaintiff suffered the loss of function of his right upper extremity. A neuro surgeon testified in behalf of the plaintiff to the effect that the disability complained of could have been caused by the trauma. At the time of the occurrence, the plaintiff earned approximately $100 per week and never resumed his employment. He had been with the Caterpillar Tractor Co. as an inspector for 10 years prior to the occurrence. Hospital and medical expenditures were shown to be almost $5,000.

The defendant urges that as a matter of law he was not guilty of negligence and that the sole proximate cause of plaintiff's injuries was the negligence of Beachler. He also earnestly argues that the negligence of Beachler was a proximate cause of the occurrence. However, such arguments do not apply in this case. The question

returned again to the hospital in November and stayed for about 2 months, during which time various treatments were administered. At the time of the trial plaintiff still wore a brace on his neck. He stated that prior to the collision he weighed 165 pounds and at the time of the trial he weighed 147 pounds. He stated he never returned to his employment. The attending physicians testified to his treatment and stated that in his opinion the plaintiff's complaints was attributable to the trauma sustained in the collision. He further stated that in his opinion the plaintiff suffered the loss of function of his right upper extremity. A nurse surgeon testified in behalf of the plaintiff to the effect that the disability complained of could have been caused by the trauma. At the time of the occurrence, the plaintiff earned approximately $100 per week and never resumed his employment. He had been with the Caterpillar Tractor Co. as an inspector for 10 years prior to the occurrence. Hospital and medical expenditures were shown to be almost $2,000.

The defendant urges that as a matter of law he was not guilty of negligence and that the sole proximate cause of plaintiff's injuries was the negligence of Beechler. He also correctly argues that the negligence of Beechler was a proximate cause of the occurrence. However, such arguments do not apply in this case. The question

of Beachler's negligence is not before this Court. The question is whether or not there is any evidence to sustain the negligence with which defendant Dobbins is charged, and whether or not such negligence may have been a contributing proximate cause of the occurrence complained of by plaintiff. The defendant is charged with negligence in that he brought his automobile to a sudden stop without any regard to the proximity or speed of a following car of which this defendant had ample notice. Dobbins admittedly observed the Beachler car behind him when he was a considerable distance north of the scene of the collision. There is no evidence that he ever again bothered to observe this following automobile. Had he looked in his rear view mirror as he approached the intersection, he might have signaled his intention to slow down if it appeared that Beachler was following too closely. While there is some conflict in the evidence as to whether Dobbins slowed his car gradually or abruptly, such conflict was for the jury to decide. The questions of negligence and proximate cause in this case were clearly for the jury to pass upon. In Gleason v. Cunningham, 316, Ill. App. 286, an analogous situation was presented. There was some evidence of sudden stopping and lack of look out to the rear on the part of defendant. The plaintiffs in that case had been following defendant and obtained a verdict on the theory that the defendant was liable for failing to signal an intention to stop. As in the instant case, the question of concurring negligence was

of Benchley's negligence is not before this court. The question is whether or not there is any evidence to sustain the negligence with which defendant Lobins is charged, and whether or not such negligence may have been a contributing proximate cause of the occurrence complained of by plaintiff. The defendant is charged with negligence in that he brought his automobile to a sudden stop without any regard to the morality or speed of a following car of which this defendant had ample notice. Nothing mentionably observed the Benchley car behind him from he was a considerable distance north of the scene of the collision. There is no evidence that he ever again bothered to observe this following automobile. Had he looked in his rear view mirror as he approached the intersection, he might have signaled his intention to slow down. It is apparent that Benchley was following too closely. While there is some conflict in the evidence as to whether Lobins slowed his car gradually or abruptly, such conflict was for the jury to decide. The questions of negligence and proximate cause in this case were clearly for the jury to pass upon. In Lipscomb v. Shuelenbarger, 216, Ark. 294, an analogous situation was presented. There was some evidence of sudden stopping and turn at least so the rear on the part of defendant. The plaintiffs in that case had been following defendant and obtained a verdict on the theory that the defendant was liable for failing to signal an intention to stop. As in the instant case, the question of concurring negligence was

argued. In affirming judgment for the plaintiff below, the Court observed that it is for the jury to pass upon controverted questions of fact and that, "In any event, the question of what is the proximate cause must be determined from the particular facts of each particular case and are not questions of law for the Court to determine, but questions of fact for the jury." We think there is ample evidence in this record to warrant a finding that there was a sudden stopping of defendant's automobile without signal and without regard to the known following automobile. We conclude that the jury justifiably believed that Dobbins could have reasonably anticipated that a sudden stop without signalling would result in a collision, causing injury to others. The trial court did not err in rejecting defendant's argument as to proximate cause.

Defendant also urges as error failure of the trial court to suppress or limit the cross-examination of the witness, Martin. It appears that upon Martin being called to testify, defendant's attorney moved to suppress his testimony or to limit his cross-examination. Martin was called by Beachler. At a conference with the Court, outside of the presence of the jury, defendant's attorney charged that Martin was being called by Beachler's attorney in furtherance of a conspiracy between plaintiff's attorney and Beachler's attorney for the sole purpose of eliciting a prior contradictory statement made by the witness and that Beachler's attorney

argued. In affirming judgment for the plaintiff below, the Court observed that it is for the jury to pass upon conflicting questions of fact and that, "In any event, the question of what is the proximate cause must be determined from the particular facts of each particular case and not questions of law for the Court to determine, but questions of fact for the jury." We think there is ample evidence in this record to warrant a finding that there was a proximate stopping of defendant's automobile without signal or without regard to the known following automobile. It is evident that the jury justifiably believed that Robins could have reasonably anticipated that a sudden stop without signalling would result in a collision, causing injury to others. The trial court did not err in rejecting defendant's arguments as to proximate cause.

Defendant also urges as error the failure of the trial court to suppress or limit the cross-examination of the witness, Smith. It appears that upon Smith being called to testify, defendant's attorney moved to suppress his testimony on the ground of cross-examination. Smith was called by Goodman. In a conference with the Court, outside of the presence of the jury, Plaintiff's attorney charged that Smith was being called for Goodman's advantage in furtherance of a conspiracy between plaintiff's attorney and Goodman's attorney for the sole purpose of eliminating a prior contradictory statement made by the witness and that Goodman's attorney

was acting in bad faith in that he knew that this witness would testify unfavorably to his client. The trial court rejected this defendant's motions and permitted Martin to testify and be cross-examined by the attorneys for both parties. Defendant's attorney makes a very serious charge in alleging misconduct of counsel as ground for a new trial. In the conference with the Court, he charged that Beachler's attorney knew of the existence of a prior contradictory statement and that if the witness Martin were permitted to testify, this prior statement would be brought out on cross-examination by plaintiff's attorney and that his client would be irreparably prejudiced. We think the record demonstrates this argument to be fallacious. Apparently the defendant's attorney regarded as prejudicial any evidence, testimony, or turn of events that might be unfavorable to his client. There is no question but that Martin was an occurrence witness and had knowledge of material facts. His testimony on direct examination clearly supported the theory of defense relied upon by Beachler. On cross-examination by plaintiff's attorney, he freely admitted having made a prior contradictory statement. When cross-examined by defendant's attorney, he explained the reasons for the variance in his versions of the accident, indicated that one of such versions was prompted by a feeling of ill will towards the defendant. We see no reason for not permitting the jury to hear the testimony.

of this witness and to decide for itself the weight it should be accorded in view of his prior contradictory statement and his explaination thereof. It occurs to us that counsel for defendant, Dobbins, has gone to rather extreme lengths in serving his client. We find no evidence which would appear to justify his intemperate remarks concerning opposing counsel. The ultimate result of the proposition he urges would be the elimination of all testimony emanating from a source which might prove unreliable and harmful to one side of a case.

It is elementary that the effect of impeaching a witness by introducing a prior contradictory statement is the casting of doubt upon the credibility of such witness. Such impeaching evidence does not constitute substantive proof of the truth of the facts in question. An instruction to that effect is available to a party who might otherwise feel prejudiced. We note that no such instruction was tendered by defendant Dobbins. Eizerman v. Behn, 9 Ill. App. 2d 263.

Complaint is made that an improper foundation was laid for the impeachment of Martin's testimony by the attorney for the plaintiff. We are inclined to agree that a broader foundation might have been required if the witness had denied making the contradictory statements alluded to; but inasmuch as the statements were freely admitted, and concerned material points with substantial variance from the statements made on direct examination, we are constrained to hold that no prejudice nor reversible error occurred. The time and

of this witness and to decide for itself the weight it should be accorded in view of his prior contradictory statement and his explanation thereof. It seems to us that counsel for defendant, Dobbins, has gone to rather extreme length in serving his client. We find no evidence which would appear to justify his intemperate remarks concerning opposing counsel. The ultimate result of the prosecution he urges would be the elimination of all testimony emanating from a source which might prove unreliable and hurtful to one side of a case.

It is elementary that the effect of impeaching a witness by introducing a prior contradictory statement in the opinion of jurors upon the credibility of such witness. Such impeaching evidence does not constitute substantive proof of the truth of the facts in question. An instruction to that effect is available to a party who might otherwise feel prejudiced. We note that no such instruction was tendered by defendant Dobbins. Hiscoman v. Duhn, 9 Ill. App. 2d 369.

Complaint is made that an improper translation was had of the impeachment of Martinez's testimony by the attorney for the plaintiff. We are inclined to agree that a proper translation might have been required if the witness had denied making the contradictory statements alleged to, but inasmuch as the statements were freely admitted, and concerned material points with substantial variance from the statements made on direct examination, we are constrained to hold that no prejudice nor reversible error occurred. The time and

place of witness's prior contradictory statements were established, and he freely identified the occasion thereof and admitted such statement without reservation. Rodenkirk v. State Farm Mutual Automobil Insurance Company, 325 Ill. App. 421.

Complaint is made that the trial court erroneously refused to give certain instructions tendered by defendant Dobbins. Instruction No. 16 which is one of those complained of, is as follows:

> The Court instructs the jury that if you believe from the evidence that the defendant, William Beachler, followed the defendant, Charles Dobbins', vehicle more closely than was reasonable and prudent, having due regard for the speed of both vehicles and the traffic conditions upon the highway and that this was the proximate cause of the collision and the resulting injuries to the plaintiff, then you should find the defendant, Charles Dobbins, not guilty; and the defendant, William Beachler, guilty.

The Court gave instruction No. 12, which is as follows:

> The Court instructs the jury that if you find from a preponderance of the evidence that the sole proximate cause of the accident in question was the act of the defendant, William Beachler, and was not through any negligence on the part of the defendant, Charles Dobbins, then you should find the defendant, Charles Dobbins, not guilty.

Instruction No. 16 is substantially a repetition of No. 12 and moreover, it fails to include one important element; namely, that the action of Beachler in following too close was the sole proximate cause. It refers to "the proximate cause" of the collision, and we believe under the circumstances of this case, the instruction was misleading. At any rate, since the matter was covered by other instructions, the jury appears to have been correctly instructed when all the

place of witness's prior contradictory statements were established, and he freely identified the possession thereof and admitted such statement without reservation. Rodewald v. State Farm Mutual Automobile Insurance Company, 325 Ill. App. 421.

Complaint is made that the trial court erroneously refused to give certain instructions tendered by defendant Robbins. Instruction No. 16 which is one of those complained of, is as follows:

> The Court instructs the jury that if you believe from the evidence that the defendant, William Beaschler, failed the defendant, Charles Robbins, vehicle more distantly than was reasonable and prudent, having the regard for the speed of both vehicles and the traffic conditions upon the highway and that this was the proximate cause of the collision and the resulting injuries to the plaintiff, then you should find the defendant, Charles Robbins, not guilty; and the defendant, William Beaschler, guilty.

The Court gave instruction No. 12, which is as follows:

> The Court instructs the jury that if you find from a preponderance of the evidence that the sole proximate cause of the accident in question was the act of the defendant, WILLIAM Beaschler, and was not through any negligence on the part of the defendant, Charles Robbins, then you should find the defendant, Charles Robbins, not guilty.

Instruction No. 16 is substantially a repetition of No. 12 and moreover, it fails to include one important element; namely, that the action of Beaschler in following too close was the sole proximate cause. It refers to "the proximate cause" of the collision, and we believe under the circumstances of this case, the instruction was misleading. At any rate, since the matter was covered by other instructions, the jury appears to have been correctly instructed when all the

instructions are taken together as a whole and, therefore, we find no merit in defendant's contention. Woolsey v. Rupel, 13 Ill. App. 2d 48.

The Court refused defendant's tendered instruction No. 17, which was as follows:

> The Court instructs the jury that if you believe from the evidence that the defendant, William Beachler, followed the defendant, Charles Dobbins', vehicle more closely than was reasonable and prudent having due regard for the speed of both vehicles and the traffic conditions upon the highway and that this was the proximate cause of the collision and the resulting injuries to the plaintiff, you should find defendant, Charles Dobbins, not guilty.

This instruction is subject to the same criticism as that leveled at No. 16 and it was properly refused.

Defendant urges as error the conduct of the jury during the course of the trial. It appears that one of the jurors had a conversation with Beachler, during the course of the trial, and that the subject of such conversation was Beachler's failure to have insurance at the time of the occurrence. The record does not disclose whether or not in the conversation any reference was made to the defendant, Dobbins, having carried insurance. This conversation occurred while the juror and defendant, Beachler were in the men's wash room in the Courthouse. In a post trial proceeding, other jurors testified that they had been informed that one of the two defendants did not carry insurance and there was some evidence that this defendant was identified as Beachler.

instructions are taken together as a whole and, therefore, we find no merit in defendant's contention. Wagner v. Ruppel, 17 Ill. App. 2d 18.

The court refused defendant's tendered instruction No. 17, which was as follows:

> The fact instructs the jury that if you believe from the evidence that the defendant, William Doughler, followed the defendant, Jimmie Dobbins', vehicle more closely than was reasonable and prudent having due regard for the speed of such vehicle and the traffic conditions upon the highway and that this was the proximate cause of the collision and the resulting injuries to the plaintiff, you should find defendant, Charles Dobbins, not guilty.

This instruction is subject to the same criticism as that levelled at No. 16 and it was properly refused.

Defendant urges as error the conduct of the jury during the course of the trial. It appears that one of the jurors had a conversation with Doughler, during the course of the trial, and that the subject of such conversation was Doughler's failure to have insurance at the time of the occurrence. The record does not disclose whether or not in the conversation any reference was made to the defendant, Dobbins, having carried insurance. This conversation occurred while the juror and defendant, Doughler were in the men's rest room in the courthouse. In a post trial proceeding, other jurors testified that they had been informed that one of the two defendants did not carry insurance and there was some evidence that this defendant was identified as Doughler.

It is the well established rule that jurors will not be permitted to impeach their own verdict. Smith v. Illinois Valley Ice Cream Company, 20 Ill. App. 2d 312. Aside from such rule, the conduct of the juror would appear to afford no sound reason for disturbing the ruling of the trial court on the post trial motion. Beachler apparently derived no benefit from having imparted this information concerning the insurance to the jury, because it returned a verdict against him. Nor does it appear that the juror had any conversation with respect to the economic status of defendant, Dobbins, or as to whether he carried insurance or not. The result below would seem to have obtained in spite of the alleged improper conduct, all of which would seem to provide additional reason for upholding the trial court's action.

Dobbins requested a new trial below on the grounds of newly discovered evidence. The claimed newly discovered evidence related to the medical history of plaintiff and the motion below was supported by affidavits from doctors to the effect that the plaintiff's complaints were probably attributable to a condition that existed prior to the subject occurrence. We have examined these affidavits and cannot agree that defendant ought to be afforded another opportunity to defend the claim of plaintiff. The pre-existing medical defense related to a Workmen's Compensation case which arose in 1955 against the Caterpillar Tractor Company. The defendant urges that knowledge of this pre-existing disability was obtained after the trial in this

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case. Careful examination of the record discloses that the plaintiff, pursuant to discovery, informed the defendant of his earlier accident at the Caterpillar Tractor Company plant, provided defendant with the date thereof and went into considerable detail concerning his complaints and the treatment of his injuries. It would seem, therefore, that this defendant had ample pre-trial opportunity to explore the medical defense upon which his post trial motion is based. However, in his post trial motion, the defendant states that the first time he examined the Workmen's Compensation file was after the adverse verdict was returned below. We do not believe that the defendant has exercised diligence in this regard, and, therefore, he cannot be entitled to a new trial on this ground. Chicago and Alton Railroad v. Raidy, 203 Ill. 310.

Defendant Dobbins also urges that the verdict and judgment are against the manifest weight of the evidence and that the verdict is excessive. It is well settled that the verdict and the judgment will not be disturbed unless palpably erroneous, where a jury has passed upon disputed questions of fact. Benkendorf v. Seemann 21 Ill. App. 2d 409. We have carefully examined the evidence in this record and cannot say that the result below is clearly erroneous.

In view of the severity of plaintiff's injuries, his permenant disability and the large amount expended to the date of trial in connection with such injuries, we think there is no merit in defendant's contention that the verdict is excessive. Whether or not this court would have arrived at a higher or lower figure is

case. Careful examination of the record discloses that the plaintiff, pursuant to discovery, informed the defendant of his earlier accident at the Caterpillar Tractor Company plant, provided defendant with the date thereof and went into considerable detail concerning his complaints and the treatment of his injuries. It would seem, therefore, that this defendant has ample pre-trial opportunity to explore the medical defense upon which his post trial motion is based. However, in his post trial motion, the defendant alleges that the jury should have heard the Workmen's Compensation file was after the verdict was returned below. We do not believe that the defendant can complain of illegence in this regard, therefore, we cannot be confined to a new trial on this ground. Bridges vs. Illinois Bell Tel. Co., 209 Ill. App.

Defendant's other plea raises the question of the verdict and judgment are against the manifest weight of the evidence and that the verdict is excessive. It is well settled that the verdict and the judgment will not be disturbed before reliable conclusion, where a jury has passed upon the evidence, conflicting of fact. Dorkerwolf v. Seemann 24 Ill. App. 2d 409. We have carefully examined the evidence in this record and cannot say that the verdict below is clearly erroneous.

In view of the severity of plaintiff's injuries, his permanent disability and the large amount expended by the date of trial in connection with such injuries, we think there is no merit in defendant's contention that the verdict is excessive. Whether or not this court would have arrived at a higher or lower figure is

immaterial. The question presented here is whether the amount of the verdict is so grossly excessive that justice requires a different result. The award to plaintiff indicates neither passion nor prejudice, but in our opinion represents the fair and reasonable judgment of an unprejudiced jury.

For the reasons indicated, the judgment is affirmed.

AFFIRMED

ROETH, P.J. and REYNOLDS, J., concur.

Abstract

General No. 11523 (Abstract Only)

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT
(SECOND DIVISION)

OCTOBER TERM, A.D. 1961

LYMAN R. LUNDY and JOHN L. BUTLER, d/b/a LUNDY, BUTLER & LUNDY, Plaintiffs-Appellees, vs. HAZEL R. MESSER, ADAM G. MESSER, GEORGE E. JOHNSON, MARIE JOHNSON, JOSEPHINE MARTIN, RUTH I. MESSER, C. RUSSEL MESSER, KENNETH H. MESSER, and NORMAN D. L. MESSER, Defendants. (HAZEL R. MESSER, Appellant).	Appeal from Circuit Court of Winnebago County.

SPIVEY--P. J.

The Circuit Court of Winnebago County pursuant to the mandate of this court in Lundy et al. vs. Messer et al., 25 Ill. App. 2d. 513, 167 N.E. 2d. 278, entered a decree of foreclosure.

From this decree and from an order denying a motion to vacate said decree one of the defendants appeals.

The mandate in part provided, "and that this cause be remanded to the said Circuit Court of Winnebago County with directions to find and determine the amount due and owing the plaintiffs under the terms of the instrument concerned excluding the

General No. 11572 (Harrison Cir.)

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT
(SECOND DIVISION)

October Term, A.D. 1951

LYMAN R. LUNDY and JOHN T. DUTLER, d/b/a LUNDY, DUTLER & LUTDY, Plaintiffs-Appellees, vs. HAZEN R. MESSER, ADA G. MESSER, GEORGE L. JOHNSON, [illegible], JOSEPHINE MARTIN, RUTH I. [illegible], O. RUSSEL MESSER, KENNETH [illegible] MESSER, and NORMAN D. [illegible], Defendants. (HAZEN R. MESSER, Appellant).	Appeal from Circuit Court of Winnebago County.

SPIVEY--P. J.

The Circuit Court of Winnebago County pursuant to the mandate of this court in Lundy et al. vs. Messer et al., 25 Ill. App. 2d. 513, 167 N.E. 2d. 274, entered a decree of foreclosure. From this decree and from an order denying a motion to vacate said decree one of the defendants appeals.

The mandate in part provided, "and then this cause be remanded to the said Circuit Court of Winnebago County with directions to find and determine the amount due and owing the plaintiffs under the terms of the instrument concerned excluding the

item of attorneys' fee in the sum of $1,256.79, and to enter an appropriate foreclosure decree."

Pursuant to the mandate the cause was redocketed, the original decree of foreclosure was vacated, and the instant decree entered, which was in all respects identical with the original decree except the amount found due the plaintiffs was reduced in the amount of the attorneys' fee of $1,256.79.

Appellant contends that the instant decree is void in that (1) there is no evidence to support the decree, and (2) the provision of the decree providing for a deficiency judgment against the appellant is unauthorized.

Appellant's contention that the decree of foreclosure is not supported by any evidence is without merit.

This court in the first appeal fully reviewed the evidence adduced at the foreclosure hearing and found the evidence fully supported the court's findings and order as evidenced by the original decree, except as to the item of attorneys' fee.

Appellant does not favor the court with the citation of any authority requiring a hearing of further evidence under these circumstances.

Appellant's motion to vacate the instant decree makes no issue as to the correctness of the court's determination of the amount due and owing the plaintiffs. Neither does that motion attack the propriety of the provision for a deficiency judgment.

The provision for a deficiency judgment was contained in the original decree of foreclosure. No assignment of error was made in this regard in the first appeal and consequently cannot be considered now.

Upon remandment by a reviewing court, the trial court's action is limited to the directions of the mandate. Fox v. Coyne, 25 Ill. App. 2d. 352, 166 N.E. 2d. 474, and Ptaszek v. Konczal, 10 Ill. 2d. 326, 140 N.E. 2d. 725.

item of attorney's fee in the sum of $1,276.79, and to enter an appropriate foreclosure decree."

Pursuant to the remanded the cause was reconsidered, the original decree of foreclosure was vacated, and the instant decree entered, which was in all respects identical with the original decree except the amount found due, the principal sum was reduced in the amount of the attorney's fee of $1,276.79.

Appellant contends that the instant decree is void in that (1) there is no evidence to support the decree, and (2) the provision of the decree provides for a deficiency judgment against the appellant in contravention.

Appellant's position in that the decree of foreclosure is not supported by any evidence is without merit.

This court in the first appeal had reviewed the evidence adduced at the foreclosure hearing and [illegible] fully supported the court's findings and [illegible] by the original decree, except as to the amount of attorney's fee.

Appellant does not favor the court with any citation of any authority requiring a remanding of further evidence under these circumstances.

Appellant's motion to remand the [illegible] cause means no less as to the correctness of the court's determination of the amount due and owing to the plaintiff. Neither does that motion attack the propriety of the provision for a deficiency judgment.

The provision for a deficiency judgment was contained in the original decree of foreclosure. No complaint of error was made in this record in the first appeal and consequently cannot be considered now.

Upon remandment by a reviewing court, the trial court's action is limited to the directions of the mandate. Fox v. Coyne, 25 Ill. App. 2d. 352, 165 N.E. 2d. 474, and Fessler v. Bonczek, 10 Ill. 2d. 326, 140 N.E. 2d. 725.

We find that the trial court in all respects fulfilled its duty in carrying out the mandate of this court in Lundy v. Messer, 25 Ill. App. 2d. 513, 167 N.E. 2d. 278.

The decree of the Circuit Court of Winnebago County is affirmed.

Affirmed.

Crow, J., and Wright, J., concur

Crow, J., and Wright, J., concur

48267

JOHN P. GIBBONS and CHARLES M. HANLY, d/b/a SOUTH EAST LAND COMPANY,	)	APPEAL FROM
Appellees,	)	SUPERIOR COURT,
v.	)	
BOARD OF APPEALS OF CITY OF CHICAGO, etc.,	)	COOK COUNTY.
Appellants.	)	

ON REHEARING

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Plaintiffs seek a special use permit for the disposal of refuse on a vacant tract of land in Chicago. The Zoning Board of Appeals of Chicago found that no facts were presented which would justify it in approving plaintiffs' application for the approval of a special use and denied it. In an administrative review action filed by plaintiffs, the trial court reversed the Zoning Board of Appeals, and it appeals to this court.

This appeal was heretofore dismissed by this court. We took notice of facts which do not appear in the record (LaSalle Nat'l Bank v. City of Chicago (1954), 3 Ill.2d 375; Gold v. B/G Foods, Inc. (1960), 23 Ill. App.2d 376), from which it was decided that there was no real controversy presented here, because during the pendency of this appeal, a "deputy Commissioner of Buildings" of the City of Chicago issued a letter of permission to use, for dumping purposes, an area which included

the premises covered by plaintiffs' application. We believed that the granting of such use by the City of Chicago, although later revoked, was inconsistent with the position of defendants in this court.

As contended by defendants in their petition for rehearing, we have concluded that the letter of permission was an unauthorized act, a nullity without legal effect, and should not be considered to be the act of the City. It was the act of an agent, which exceeded his authority, and calls for the application of the general rule "that a city cannot be estopped by an act of its agent beyond the authority conferred upon him." (Cities Service Oil Co. v. City of Des Plaines (1961), 21 Ill. 2d 157, 160.) Therefore, we have determined this appeal on its merits.

As required by the Administrative Review Act (Ill. Rev. Stat. 1959, Ch. 110, §272(b)) the answer of the defendant Zoning Board of Appeals contains a certified copy of the record of proceedings under review. It consists of pertinent documents and a stenographic report of the public hearing. As the act directs that "no new or additional evidence" shall be heard by the reviewing court, it was on this record that the trial court found that the plaintiffs are lessees of the property in question and had complied with the necessary procedural steps to invoke the jurisdiction of the Board of Appeals. The trial court

reversed the decision of the Board of Appeals and directed that plaintiffs be allowed to use the described property "for a refuse disposal site without further hearing."

Jurisdiction to review the final administrative decisions is vested in the Circuit and Superior Courts by the Administrative Review Act (Ill. Rev. Stat. 1959, Ch. 110 §§264-279). In construing the Act, our Supreme Court has said:

> "The provisions of the act as to the scope of judicial review have been construed to mean that the courts are not authorized to reweigh the evidence or to make an independent determination of the facts. The reviewing court is limited to a consideration of the record to determine if the findings and orders of the administrative agency are against the manifest weight of the evidence. *** Under the provisions of the act requiring the courts to regard the findings of the agency as prima facie true and correct, the court has a judicial function comparable to the issue at law as to whether there is competent evidence to support a judgment of a lower court." (Parker v. Dept. of Registration (1955), 5 Ill.2d 288, 294.)

The fact that the court, if it had been hearing the case originally, would have, from the evidence, reached a conclusion different from that reached by the Board, is immaterial. The only question properly before the trial court on the appeal from the finding and decision of the Zoning Board of Appeals, was whether that finding and decision were against the manifest weight of the evidence. Adamek v. Civil Service Commission (1958), 17 Ill. App.2d 11.

Although the trial court made no finding that the findings and decision of the Zoning Board of Appeals are against the manifest weight of the evidence, we believe this finding is

implicit in the judgment order of the trial court. Therefore, we think the sole question before this court is whether the trial court was correct in that determination.

Defendants contend that no legal evidence was presented to the Zoning Board of Appeals. We do not agree. The stenographic report shows that the hearing was conducted somewhat informally by the chairman, and at times assumed the proportions of a general discussion entered into by all those present. Although the witnesses were sworn as a group, the record names and identifies each witness sufficiently to make it apparent that those who testified were included in the group sworn as witnesses.

The hearing shows that the City of Chicago entered into a contract for the disposal of refuse with the plaintiffs, on a site to be furnished by plaintiffs; that the contract was forfeited because plaintiffs failed to show sufficient right or title to operate on the site in question and, also, that they did not have a special use permit to dump on that site; that plaintiffs then filed an application for a variation in the nature of a special use for the disposal of refuse on that site, which is a low, vacant, marshy, swamp area; that the lessor owners are anxious to have it filled in; that it is the only area left in the City suitable for the dumping of refuse; that there is nothing to be disturbed by this operation except a few factories a half mile away; and that similar operations were being carried on in the block next to the site in question.

The objectors stated that the dumping of refuse in the area is detrimental to the entire surrounding community, due to the dank odor of garbage and dust caused by such an operation; that complaint has been made of dumping on the adjoining property, because it is an improper use. The alderman of the 10th Ward, in which the area in question is located, stated that the dumping of garbage in the ward had been a problem to him for the past ten years; that with the aid of civic organizations they were able to get the City to build an incinerator, which is insufficient to handle all of the garbage collected in the City of Chicago; that the City still dumps on a site owned by it in the ward; that the people in the area strenuously object to the dumping by the City, and "We are doing everything in our means to stop additional garbage dumping in the 10th Ward regardless of who is going to do it"; that if plaintiffs' application was denied, possibly the City "will wake up and take the proper steps to dispose of surplus garbage picked up in the city streets."

It is undisputed that there is need for sites on which to dump that part of the garbage which the incinerator is unable to take; that the City is dumping some of its garbage in an area about ten blocks away from the site in question; that an area adjacent to the site in question is currently being used for dumping, although a complaint has been filed against this use; and that the Commissioner of City Planning recommended

the approval of the application for the establishment of a dump on the location in question, "provided adequate supervision and control of odors, dust, smoke and gases is maintained to the extent that they not become nuisances extending into areas beyond the property lines of the appellant."

The proper exercise of the powers given to the Zoning Board of Appeals depends largely on the discretion and good judgment of the members of the Board. Although there may be a fair difference of opinion as to whether or not plaintiffs proved that they had met the requirements requisite for the granting of a special use, the evidence is far from conclusive. It called for a proper exercise of the Board's discretion, to reconcile conflicting evidence, if possible, and if not, to reject the evidence which it did not believe. It was the judge of the credibility of the witnesses. The reviewing trial court was not authorized to reweigh the evidence or to make an independent determination of the facts. As the findings and conclusions of the Zoning Board of Appeals shall be held prima facie true and correct, an opposite conclusion was required to be clearly evident from the record for the trial court to hold that the findings and decision of the Board were against the manifest weight of the evidence, and to reverse the Board's decision. Arboit v. Gateway Transportation Co. (1958), 15 Ill. App.2d 500, 507.

We believe, considering the record as a whole, that the Zoning Board of Appeals' decision is supported by ample evidence, and it is not contrary to the manifest weight of the evidence, as an "opposite conclusion" is not "clearly evident." In the proper exercise of its discretion from the evidence presented to it, the Board could have reasonably decided that the continued dumping of refuse in the area in question is detrimental to the entire surrounding community, and if plaintiffs' application was denied, that the City would be forced to meet the need for additional incinerator facilities, and that the making available of additional sites for garbage dumping only delayed a proper solution of the problem. Also, the Board could have reasonably determined that plaintiffs had failed to show that they were prepared to provide "adequate supervision and control of odors, dust, smoke and gases" to the extent that they did not become nuisances extending into areas beyond the property lines of plaintiffs.

For the reasons given, we believe the trial court was in error in reversing the findings and decision of the defendant Zoning Board of Appeals, and the judgment order of the trial court should be reversed.

REVERSED.

BURMAN, J., CONCURS.

ENGLISH J., TOOK NO PART.

ABSTRACT ONLY.

48267

JOHN P. GIBBONS and CHARLES M. HANLY, d/b/a SOUTH EAST LAND COMPANY,	)	
Appellees,	)	APPEAL FROM
v.	)	SUPERIOR COURT,
BOARD OF APPEALS OF CITY OF CHICAGO, SAMUEL T. LAWTON, B. EMMET HARTNETT, C. LOGAN McEWEN, EARL J. McMAHON and KARL M. VITZHUM, members,	)	COOK COUNTY.
Appellants.	)	

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Plaintiffs seek a special use permit for the disposal of refuse on a vacant tract of land in Chicago. The Zoning Board of Appeals of Chicago found that no facts were presented which would justify it in approving the application. A complaint for administrative review being filed by plaintiffs, the trial court entered a judgment reversing the Zoning Board of Appeals, and it appeals to this court.

Subsequent to oral argument before this court on April 10, 1961, plaintiffs moved that the appeal be dismissed, since there is no real controversy between the parties to this record, because the City of Chicago, on January 26, 1961, granted permission to use, for dumping purposes, an area which included the premises in question. Although a photostatic copy of the permission, attached to the motion, shows it is directed

to a party not of record, we believe the granting of such use by the City of Chicago, although later revoked, is inconsistent with the position of defendants in this court and makes moot the question this court has been asked to decide. (Gold v. B/G Foods, Inc. (1960), 23 Ill. App. 2d 376.) Accordingly, the appeal is dismissed.

APPEAL DISMISSED.

KILEY, P.J., AND BURMAN, J., CONCUR.

ABSTRACT ONLY.

48302

H. MANDELBAUM, d/b/a H. MANDELBAUM MACHINERY MOVERS,	)	APPEAL FROM THE
Plaintiff-Appellee	)	MUNICIPAL COURT
vs.	)	
G. F. CONNELLY CO., INC., a Corporation,	)	OF CHICAGO
Defendant-Appellant.	)	

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

This action was brought by a sub-contractor, Harry Mandelbaum, against the prime contractor, G. F. Connelly Co., Inc., to recover payment for "work, labor and materials" beyond that specified in a written contract between the parties and claimed to have been furnished at defendant's request. Defendant reinforced his general denial with the affirmative averment that all agreements between the parties appear in the written instrument. The case was tried without a jury and the court entered judgment for plaintiff in the amount of $738.50. Defendant has appealed upon the grounds that the judgment was manifestly against the weight of the evidence and contrary to law.

In March of 1957, defendant was acting as general plumbing and heating contractor on a construction job for the Transo Envelope Company in Chicago. In response to defendant's request, plaintiff, who is in the machinery moving business, submitted written bids to defendant on March 21, 1957, to install three new boilers at the Transo Envelope Company Building "in a north and

south position in boiler room on 21-inch base" for $2760.00 and to remove three old boilers and clean up all brick for $1650.00, both jobs totalling $4410.00. On May 2, 1957, defendant placed its signed acceptance upon the original copy of the bid and returned it to plaintiff along with a letter acknowledging its order for the removal of the old boilers and for the setting of the new boilers "as per your quotations of March 21, 1957."

Much of the testimony concerning the remaining facts is in sharp conflict. Plaintiff testified that he went to the premises on July 3, 1957, to install the first boiler and discovered for the first time that the base for the new boilers was to be seventy-two inches high rather than the prescribed twenty-one inches. He described the new problems that arose as a result of this change, and stated that he informed William King, defendant's superintendent, that there would be an extra charge of at least $500.00 per boiler if plaintiff was required "to put that enormously high base underneath the boiler because the boiler was at least sixteen feet high as it was," and that Mr. King replied, "that's what they want, that is what you will have to put in." Plaintiff further testified that after the first boiler was installed he sent defendant an invoice for $538.55 for the extra work as indicated by his time sheets introduced in evidence; that defendant arranged a meeting between

plaintiff and representatives of Transo Envelope Company and attempted to get plaintiff more money from Transo for the extra work; that since the Transo officials refused to pay any additional money, the defendant, after the meeting, promised to pay plaintiff for the extra work or give him additional jobs to make up the loss; that several months later, after he had installed the second and third boilers, plaintiff mailed defendant a second invoice for $546.00 for extra work in installing them and a statement for $200.00 for overtime labor in cleaning up rubbish; that plaintiff has never received additional work from defendant nor payment for any of the extra work.

George Connelly, defendant's president, testified that when his company was informed by its principal that it would be physically impossible to install the boilers in the position originally contemplated and that the size of the bases would have to be made much higher, his superintendent immediately informed plaintiff who verbally agreed that the change in the base would make no difference to him and that the same price for installation would stand; that this verbal agreement was made prior to defendant's acceptance of the contract; that it was not the size of the base that troubled plaintiff but the type used - a type with which plaintiff was unfamiliar; that because of plaintiff's miscalculations as to cost he sought to change the terms of the contract; that he arranged the meeting referred to by plaintiff

in an attempt to help out plaintiff, but the owner of the building refused to pay any additional money; that he, Connelly, never agreed to pay any more money than the contract called for - a fact evidenced by his payment of the full original price which plaintiff accepted; that Connelly knew the job was taking more labor than plaintiff contemplated so he told plaintiff he would try to give him some work in the future and "maybe he would be able to come out on some of the other work." Connelly's testimony was substantially supported by William King, defendant's superintendent.

The trial court denied recovery for the work on the second and third boilers, but entered judgment for plaintiff on the $200.00 overtime claim and on the $538.50 claim for extra work on the first boiler.

Defendant argues that the evidence clearly shows that defendant did not accept the bid until after plaintiff agreed to install the boilers on a higher base, and even then the acceptance was on the basis of the original price quotation of $4410.00. We have shown, however, that the evidence on this matter is in obvious conflict. The determination of the extent to which the parties verbally altered the contract lay chiefly in ascertaining the credibility of the witnesses. The trial judge who heard and saw the witnesses was in a much better position to ascertain the truth and detect falsehood than is this court of review. (Coons v.

Coons, 30 Ill. App.2d 325). When evidence is contradictory the findings of the trier of fact will not be disturbed unless we are able to determine that those findings are manifestly against the weight of the evidence. (Eleopoulos v. City of Chicago, 3 Ill. 2d 247, Wynekoop v. Wynekoop, 407 Ill. 219). In order to decide that the judgment is manifestly against the weight of the evidence we would be required to find that an opposite conclusion is clearly evident. (Arboit v. Gateway Transportation Co., 15 Ill. App. 2d 500). We cannot so find.

Defendant raises the additional contention that the judgment is contrary to the law. He argues that the judgment for extra work, in effect, created a new contract for the litigants, in defiance of the rule stated in Capitol Paper Box v. Belding Hosiery Mills, Inc., 350 Ill. App. 68, Beard v. Comstock, 227 Ill. App. 132, and numerous other cases, that it is the duty of the court to enforce a contract according to the terms agreed upon by the parties. This contention is, of course, inextricably linked with defendant's contention that the parties orally agreed to change the specifications of the contract but maintain the stipulated price quotations. As we have shown the trial judge found that the alteration included an agreement for additional compensation, at least with regard to the first boiler and cleanup overtime, and we think he was justified in so doing. It is our

view that defendant's citation of authorities for the enforcement of contracts according to their terms becomes support for the judgment in plaintiff's behalf.

For the reasons stated, the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

MURPHY, P.J., CONCURS.

MR. JUSTICE ENGLISH SPECIALLY CONCURRING.

I agree with the majority that the contract between the parties called for removing three old boilers and positioning new boilers on 21-inch bases. And I agree with the proposition that plaintiff is entitled to additional compensation for the additional work which was done at the request of defendant. I cannot agree, however, that this proposition finds support in the evidence for an allowance of $538.50 for extra work on the first boiler, nor for an allowance of $200.00 for extra work done in removing the debris of the old boilers.

While plaintiff did testify that the item of $538.50 was for extra work required in emplacing the first boiler, the invoice, detailed job tickets and time sheets which he introduced in evidence to justify this figure clearly show that it covered all the work of putting the boiler on its 6-foot base

and not just that done in jacking it up from 21 inches to 6 feet. Only the latter could be considered as extra work beyond the contract. It is manifest, therefore, that the proper compensation due plaintiff for extra work on the first boiler is something less than $538.50.

The item of $200.00 for cleaning up the brick debris when the old boilers were removed, covered work which was required of plaintiff by the contract.* Plaintiff testified that defendant wanted this work done at night instead of during the day hours called for by the contract, so plaintiff paid the $200.00 to laborers for cleaning up the rubbish at night. Since the work done was part of plaintiff's contractual obligation, his recovery for this item should properly be limited to the bonus portion of the overtime rate paid for night work and not for all of the night work expense. The weight of the evidence makes it clear, therefore, that plaintiff is entitled to something less than the $200.00 claimed for this item.

As to the second and third boilers, the testimony of plaintiff concerning extra work is specifically supported by the invoice and job tickets in evidence. They show that the work done for a charge of $546.00 "consisted of jacking up above the 21" called for by contract." There was also some waiting time

* Plaintiff's bid specified: "We will remove three (3) boilers *** and clean up all brick ***."

Defendant's order specified: "for removing old existing (3) three boilers, and all debris resulting of same ***."

covered by this invoice which was unexplained by the testimony and does not seem to be a proper extra. Practically all of this item, however, represented work not included in the contract but performed on defendant's order. It should, therefore, have been allowed in substantially the amount of the invoice.

Plaintiff's Statement of Claim is for a lump sum of $1,284.50. It is not divided into counts or parts with respect to three separate claims. The three invoices were all admitted into evidence and they and the testimony concerning the three items of work may all be considered with reference to the total amount sought by plaintiff in his Statement of Claim. The fact that the trial court did not give plaintiff any credit under the $546.00 invoice does not prevent this court from considering it. A cross appeal is not necessary so long as plaintiff merely seeks affirmance of the judgment in the amount allowed by the trial court.

The trial court entered judgment for $738.50. While I do not agree with the trial court's view of the evidence, for the reasons stated, it is my opinion that the entire record warrants a judgment for plaintiff in at least that amount. (Monarski v. Greb, 407 Ill. 281; National Gas & Oil Co. v. Rizer, 20 Ill. App. 2d 332.) I, therefore, concur with the majority in believing that the judgment should be affirmed.

Abstract only.

48391

PETER S. SARELAS, Plaintiff-Appellant,	)	APPEAL FROM
v.	)	SUPERIOR COURT OF
PHILLIP S. MAKIN, alias Phillip S. Marinacos; and BASIL CHRISTOFORACOS, alias Hristos Cokinis; and JOHN C. GEKAS, Defendants-Appellees.	)	COOK COUNTY

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment order of the Superior Court dismissing a complaint charging libel against Basil Christoforacos, his attorney, Phillip S. Makin, and an alleged collaborator, John C. Gekas. The complaint alleged essentially that Makin and Gekas conspired with and caused Christoforacos to make false and malicious answers to interrogatories propounded to him by plaintiff in a prior Circuit Court action, knowing that those answers were false and made only for the purpose of defaming plaintiff and injuring his good reputation. The cause was heard on defendants' motions for involuntary dismissal, or for judgment on the pleadings or summary judgment. Plaintiff appealed directly to the Supreme Court which transferred the case to this court.

For a better understanding of the controversy we will briefly relate the facts that led up to the present suit.

Defendant Christoforacos, on August 30, 1958, mailed a letter written in Greek to plaintiff Sarelas, accusing him of dishonesty and betrayal concerning prior confidential transactions between them. During the months of October and November, 1958, Sarelas filed four separate criminal complaints or informations against Christoforacos in the Municipal Court of Chicago, accusing Christoforacos of using obscene and lewd words over the telephone on several different occasions in violation of §16.4, ch. 134, Ill. Rev. Stat. (1957). The cases were consolidated and Christoforacos was found not guilty. During the trial defendant Gekas was sworn and acted as interpreter for Christoforacos who was represented as being unable to speak English. Thereafter Christoforacos, through his attorney, Makin, filed suit against Sarelas in the Circuit Court of Cook County for malicious prosecution of the four criminal informations. Sarelas answered and filed a counterclaim alleging damages as the result of malicious conduct, defamatory accusations, threats and intimidations inflicted upon him by Christoforacos and his collaborator, Gekas.

In connection with his counterclaim Sarelas propounded a large number of written interrogatories which were answered by Christoforacos and filed for record by Makin, his attorney. Those interrogatories and answers material to the instant case relate to the "purpose" for which Christoforacos wrote the

aforementioned letter, an "explanation" of the contents of the letter, and the "purpose" for which Christoforacos conferred with defendant Gekas. While the malicious prosecution suit and counterclaim were still pending plaintiff filed the instant suit seeking damages for loss of reputation and mental suffering which he claimed were the result of the libelous answers to the interrogatories.

The Circuit and Superior Court cases were heard together. The trial court, upon reviewing the record and hearing argument of counsel, dismissed both suits. The present appeal before us is only directed to the dismissal of the suit filed by Sarelas in the Superior Court. None of the parties appealed from the dismissal of the prior suit in the Circuit Court.

The defendants' position is that answers to interrogatories in a judicial proceeding are privileged communications and cannot give rise to a cause of action for libel. Plaintiff contends that the answers are not privileged because, by admission of fact on the part of defendants, the answers are not relevant and material to the issues of the case. Plaintiff argues also that the question of defendants' belief as to the relevancy and materiality of the answers "is not of law for the court, but one of fact for the jury."

That statements made in the course of judicial proceedings are privileged is beyond dispute. (Parker v. Kirkland, 298 Ill. App. 340; McDavitt v. Boyer, 169 Ill. 475;

Paccini v. Myers, 173 N.Y.S.2d 181; Scott v. Statesville Plywood & Veneer Co., 81 S.E.2d 146, 240 N.C. 73; Burdette v. Argile, 94 Ill. App. 171; Maclaskey v. Mecartney, 324 Ill. App. 498.) This privilege is subject only to the requirement that the statements complained of must be relevant or pertinent to the matter in controversy, (Newell, Slander and Libel, 4th Ed. §382.) or must be "connected with or relevant or material to the cause in hand or subject of inquiry." (53 C.J.S., Libel and Slander, §104 p. 170.) This privilege also includes counsel. (Parker v. Kirkland, 298 Ill. App. 340.) In the McDavitt case the Supreme Court of Illinois stated: "No action for slander will lie against a witness for what he says or writes in giving evidence in a judicial proceeding, notwithstanding it may be malicious or false. The privilege, that exempts a witness from such action, is absolute. An action of slander will not lie for testimony given in a case, if such testimony is pertinent and material to the subject of inquiry." (p.482.)

In Ginsburg v. Black, 192 F.2d 823, 825, the Court of Appeals for the Seventh Circuit pointed out that "the matter need not be relevant in any strict sense, Brown v. Shimabukuro, 73 App. D.C. 194, 118 F.2d 17, since the privilege embraces anything that may possibly be pertinent. Andrews v. Gardiner, 224 N.Y. 440, 121 N.E. 341, 2 A. L. R. 1371. The test is not--

is it legally relevant? But - Does it have reference to the subject matter of the action? Bigelow v. Brumley, 138 Ohio St. 574, 37 N.E.2d 584. And in determining whether or not the matter is pertinent, the courts generally follow a liberal rule of pertinency, and all reasonable doubt is resolved in favor of the pleader, 33 Am. Jur. §150, p. 146; Lisanby v. Illinois Cent. R.R. Co., 209 Ky. 325, 272 S.W. 753, 755; and Sacks v. Stecker, 2 Cir., 60 F.2d 73."

"The question whether defamatory matter contained in a pleading is or is not pertinent or relevant to the cause is never left to the jury, but is a question of law for the court. Young v. Young, 57 App. D.C. 157, 18 F.2d 807, 809; Haskell v. Perkins, 165 Ill. App. 144, 150; Donner v. Francis, 255 Ill. App. 409, 412." Ginsburg v. Black, 7 Cir. 192 F.2d 823, 825.

We turn, now, to apply the tests of relevancy and pertinency to the answers in issue. The interrogatories, in substance, asked: "[S]tate for what purpose you wrote the letter in Greek? [S]tate and explain the following contents of your letter....[W]hat was the 'dishonest machination' you referred to in your said letter, and what was the 'dishonest act' you refer to in said letter? State the purpose for which you conversed with the said John C. Gekas, either before or after the trial."

It is quite clear from the nature of the interrogatories and the background of the controversy that the answers were relevant to the matter in controversy. For the purpose of this opinion we do not deem it necessary to repeat the answers made by Christoforacos. Plaintiff was inquiring into the state of mind of the witness and had good reason to expect the type of answers elicited. Moreover, plaintiff knew the contents of the letter and invited the answers that were made. The answers were responsive to the questions asked and certainly well within the degree of pertinence required to invoke the privilege.

Plaintiff's contention that the defendants' belief as to the materiality or relevancy of the answers are facts to be determined only by a jury, is premature. It is only after the court has decided that the answers are irrelevant that the question of defendants' beliefs become an issue. Plaintiff's reliance on the Burdette and Maclaskey cases is therefore ill founded. Moreover, we note that plaintiff petitioned the Circuit Court to strike the answers in controversy on the grounds that they were in bad faith, impertinent, inapplicable and libelous per se. The trial judge in that court denied the motion.

Plaintiff argues additionally that privilege is an affirmative defense which must be specially pleaded and cannot be the subject of a motion to dismiss. In response to this

question it was stated in Ginsburg v. Black, 7 Cir., 192 F.2d 823 at page 825, that "in that situation it will be sufficient to say that since the statement claimed to be privileged clearly appears from the complaint, the defense may be considered on a motion to dismiss. Anderson v. Linton, 7 Cir., 178 F.2d 304; Albrecht v. Indiana Harbor Belt R. Co., 7 Cir., 178 F.2d 577. See also, Foltz v. Moore McCormack Lines, 2 Cir., 189 F.2d 537, 539. There it was argued that privilege was a special defense and that a dismissal on motion before answer was premature. The court in disposing of that contention said: 'Even so, there would be no point in reversing upon such a technicality when the question of privilege is, as here, sufficiently presented so that it may be decided on its merits.' We think what was said there is applicable here." Since the "affirmative matter avoiding the legal effect of or defeating the claim or demand" appears on the face of the complaint we find the trial court's order of dismissal was proper under §48 (1)(i) of the Illinois Civil Practice Act.

With reference to Gekas and Makin, the complaint fails to allege facts sufficient to state a cause of action against them, even if the answers were found not to be privileged. It is unnecessary to discuss plaintiff's other contentions in light of the position we take on this matter. For the reasons stated herein the judgment of the Superior Court is affirmed.

AFFIRMED.

MURPHY, P.J. AND ENGLISH, J. CONCUR.
ABSTRACT ONLY.

48426

PEOPLE OF THE STATE OF ILLINOIS,	)	WRIT OF ERROR TO
Defendant in Error,	)	
	)	THE MUNICIPAL COURT
v.	)	
	)	
ALBERT E. STOLFO,	)	OF CHICAGO.
	)	
Plaintiff in Error.	)	

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

The defendant, Albert E. Stolfo, was charged in two separate informations with contributing to the delinquency of children by exposing himself, in violation of § 104, ch. 38, Ill. Rev. Stat. (1959). A third information charged defendant with lewd and indecent acts in violation of § 159a, ch. 38, Ill. Rev. Stat. (1953). On a plea of not guilty the three cases were consolidated and tried without a jury. The defendant was found guilty on each charge. After defendant's motions for a new trial and for arrest of judgment were denied, the court imposed judgment and concurrent sentences of one year in the House of Correction. This case is before us on writ of error.

The defendant assigns as error: (1) Insufficiency of evidence to sustain the convictions on the two charges of contributing to the delinquency of children; (2) Lack of proof of defendant's age under the Lewd Act statute; (3) Excessive sentence under the Lewd Act statute; and (4) Improper and prejudicial statements by the State's Attorney.

With respect to the sufficiency of the evidence we will consider the cases separately. Defendant was charged in case number 60 MC 33721 with contributing to the delinquency of Marell Chorney, a girl under the age of 18, in that "he did expose his privates to the said juvenile" while he was standing on the corner of 40th (amended to 48th) Street and Keeler Avenue on April 22, 1960. The amendment was made during trial without objection, and, although he assigned it as error in his brief, defendant waived any objection to this procedure during oral argument.

Marell Chorney testified that she was twelve years old and in the seventh grade; that about 8:45 in the morning of April 22, 1960, while she was walking with Joan Brenda on 48th Street between Keeler and Tripp Streets, defendant came out of an alley, grabbed her in the buttocks, and asked what time it was. She started to walk faster, and when he grabbed her a second time in the same place, she began running. When she was a distance of "the street between them" she turned and saw the defendant on the corner "exposing himself." Joan Brenda, who was 13 years of age and in the 8th grade, corroborated this testimony in every detail.

Bonnie Kunz was the State's witness in case number 60 MC 33722, charging defendant with contributing to the delinquency of a child in that he "did expose himself to the said juvenile

while he was seated in his automobile..." on November 24, 1959, (amended during trial to November 23, 1959, without objection of counsel). Defendant cited this amendment as error in his brief, but withdrew this contention during oral argument. The Kunz girl testified that she was 14 years of age and was in the 8th grade; that on the morning of November 23, 1959, while she was walking in an alley on her return from a store, defendant followed her in his car from the end of the alley to about the middle of the block and blocked the gate to her house with his car; and that while she was alongside of his car defendant, who did not get out of his car, uttered a vulgar word and "had his pants open" and "was exposed."

Defendant contends that there was not a word of evidence in the cases which specifically shows <u>what</u> the defendant exposed, leaving the court to conjecture as to what the State witnesses saw. The decisions in People v. Weber, 335 Ill. App. 215, and People v. Lobb, 10 Ill. App. 2d 125, relied upon by defendant, concern insufficient charges in the information, which is not the issue here.

We think there was sufficient evidence, if believed by the trial judge, to warrant a finding of guilty on each of the two charges. The record clearly indicates that all persons at the trial understood the unequivocal references by the witnesses to exposure of the private parts of the body. We note that the defendant understood the meaning of the testimony in

that he denied "exposing himself" when he took the witness stand. Moreover, defense counsel did not seek a further explanation from the witnesses on cross examination. It is clear to us, therefore, that the trier of fact had sufficient evidence on which to base his findings without further embarrassing the young girls.

Information number 60 MC 33723 charged that the defendant, "then and there being a person at least 17 years of age, did commit..." a lewd and indecent act, in violation of § 159a, ch. 38, Ill. Rev. Stat. (1953). The act specified was that defendant "did expose himself to the complainant while he was standing on the street...." Defendant contends that the failure of the State to prove the defendant's age under this provision is fatal to the conviction. Relying upon Wistrand v. People, 213 Ill. 72, and People v. Rogers, 415 Ill. 343, defendant argues that the provision in question is analogous to that concerning statutory rape, where it is necessary for the State to prove the age of the defendant as a part of the corpus delecti of the crime. That requirement in the statutory rape cases, however, is a direct result of the fact that the ages of both the assailant and the victim are essential elements under the crime of rape without force, and are necessary to distinguish that offense from the crime of rape. The courts have been careful to confine this peculiar requirement of proof of precise age to cases of rape without force (People v. Schultz, 260 Ill. 35) and we see no justification for extending it to cases arising under the

Lewd Act provision. In the instant case the evidence shows that the defendant was married and had two children, and had worked in the exterminating business for over four years. The exact age of an adult need not be proved unless there is evidence in the record tending to show that the defendant is under 17 years of age. People v. Cavaness, 21 Ill.2d 46; People v. Poole, 284 Ill. 39; Sutton v. People, 145 Ill. 279.

The defendant next contends that it was reversible error for the State's Attorney to advise the court that he had additional evidence pertaining to the alibi defense when such evidence was never produced. The record reveals that the trial judge asked questions concerning entries made by Interstate Machinery Company in regard to the time the defendant left the plant on April 22, 1960, and the time defendant was arrested. During closing argument the prosecutor stated that if the court had any further questions with regard to this subject he would like the case continued and would offer further evidence. The trial judge did not request further evidence, stating that he must give weight to the police officer's testimony. We do not consider the remark of the State's Attorney to have had any impact upon the decision of the trial judge. Nor do we find that the other remarks of the State's Attorney cited as error by the defendant were so improper or prejudicial as to justify a reversal.

The defendant also claimed in his brief that he had been permitted to waive a jury erroneously, without being properly advised of his right to trial by jury. This argument, however, was withdrawn during oral argument. In any event, the contention is without merit since the defendant stood by in open court while his counsel advised the court that the defendant was ready for trial and waived a jury.

We have fully considered all of the errors asserted and are of the opinion that the defendant received a fair trial and was proven guilty as charged beyond all reasonable doubt in all three cases. The trial judge improperly sentenced defendant to a one year term under §159a, where the maximum sentence that can be imposed is six months in duration. Case number 60 MC 33723 is therefore remanded for proper sentencing. People v. Wood, 318 Ill. 388.

AFFIRMED IN PART, REVERSED IN PART
AND REMANDED WITH DIRECTIONS.

MURPHY, P.J. AND ENGLISH, J. CONCUR.

ABSTRACT ONLY.

1st DIVISION

Abstract

General No. 11527 Agenda No. 2

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT - FIRST DIVISION

October Term, A.D. 1961

LUCILE R. KOVAC, Plaintiff-Appellee,	)	
vs.	)	Appeal from the Circuit Court of
JOSEPH A. KOVAC, Defendant-Appellant.	)	McHenry County.

DOVE, P.J.

On February 14, 1957 Lucile R. Kovac filed her complaint against her husband for divorce or alternatively for separate maintenance. She charged her husband with cruelty and desertion. During the pendency of the suit and on June 25, 1957 an order was entered directing the husband to pay to his wife $200.00 per week for the temporary support of herself and two minor children. On August 2, 1957, Mrs. Kovac filed her petition alleging non-compliance with this order by her husband and praying that a rule be entered requiring him to show cause why he should not be held in contempt of court for failing to comply with the provisions of this order. An answer to this petition was filed by Mr. Kovac who also, filed a cross petition seeking a modification of the order of June 25, 1957.

A hearing was had resulting in an order, entered on September 6, 1957, adjudging defendant in contempt of court and sentencing him to the County Jail of McHenry County for sixty days. This order was reviewed by this court, upon the appeal of Mr. Kovac and on April 8, 1958 the contempt

order entered by the Circuit Court of McHenry County on September 6, 1957 was affirmed. (Kovac vs. Kovac, 17 Ill. App. 2d 492, 150 N.E. 2d 664). Leave to appeal to the Supreme Court was denied. (20 Ill. App. 2d VI)

Thereafter, on December 17, 1958 a verified petition by Mrs. Kovac was filed, setting forth that her spouse had paid nothing pursuant to the order of June 25, 1957 and that there was due petitioner thereunder, the sum of $14,000.00. The petition prayed for an order directing the issuance of a mittimus to enforce the order of June 25, 1957 and that the same be delivered to the Sheriff of McHenry County to execute. Upon this petition an order was entered, which after reciting what had previously taken place concluded:

> "It is therefore ordered that a mittimus issue from the office of the Clerk of this Court directed to the Sheriff of McHenry County to take the body of the defendant, Joseph A. Kovac, on December 22, 1958 or as soon thereafter as he may secure the body of the said defendant, and him closely and safely keep in the custody of said sheriff in the common jail of McHenry County until he shall have served 60 days or until released by due process of law".

On the same day this order was entered Mr. Kovac filed his petition asking for a modification of the order of June 25, 1957; that the order sentencing him to jail for 60 days be vacated and that the cause be set for trial "so that the rights of the parties may be finally determined". The prayer of this petition was granted in part and the previous order was modified in some respects not material, however, to the determination of the question presented, by this record, for review by this court. Thereafter the case was heard resulting in a decree granting Mrs. Kovac a divorce. That decree was reviewed by this court and affirmed. (Kovac vs. Kovac, 26 Ill. App. 2d 29, 167 N.E. 2d 281).

order entered by the Circuit Court of McHenry County on September 6, 1957 was affirmed. (Kovac vs. Kovac, 17 Ill. App. 24 492, 150 N.E. 24 364). Leave to appeal to the Supreme Court was denied. (20 Ill. App. 24 VII)

Thereafter, on December 12, 1958 a verified petition by Mrs. Kovac was filed, setting forth that her spouse had paid nothing pursuant to the order of June 25, 1957 and that there is due petitioner therunder, the sum of $14,000.00. The petition prayed for an order directing the issuance of a mittimus to enforce the order of June 25, 1957 and that the same be delivered to the Sheriff of McHenry County to execute. Upon this petition an order was entered, which after reciting what had previously taken place concluded:

> "It is thereupon ordered that a mittimus issue from the office of the Clerk of this court directed to the Sheriff of McHenry County to take the body of the defendant, Joseph J. Kovac, on December 27, 1958 or as soon thereafter as he may secure the body of the said defendant, and his detention and safely keep in the custody of said Sheriff in the County Jail of McHenry County which he shall have so much so, or until released by the process of law".

On the same day this order was [illegible] Kovac filed a petition asking for a modification of the order of June 25, 1957 that the order sentencing him to jail for 60 days be vacated and the cause be set for trial to ascertain the rights of the parties and be finally determined. The grounds of this petition were greater in part and the previous order was modified in some respects not material, however, to the determination of the question presented, by this court, for review by this court. Thereafter the case was heard resulting in a decree granting Mrs. Kovac a divorce. That course was reviewed by this court and affirmed. (Kovac vs. Kovac, 24 Ill. App. 24 [illegible], 167 N.E. 24 [illegible]).

On December 22, 1958 Mr. Kovac filed his petition praying for an order vacating the orders entered on September 6, 1957 and on December 17, 1958 and that he be discharged from said contempt order. Upon a hearing the prayer of this petition was denied and Mr. Kovac again brings the record to this court for review.

Counsel for appellant state that the order of September 6, 1957 was erroneous because it makes no provision whereby the defendant might purge himself of the contempt. It is insisted by counsel that upon the former appeal this court did not hold that defendant was guilty of a direct contempt or an indirect contempt of court and did not decide whether the contempt was civil or criminal or whether defendant had a right to purge himself from the contempt of which he was found guilty. Counsel state that all this court held was that the order entered by the chancellor was sufficient to hold defendant in contempt of court and insista that "the issues are plainly different on this appeal from the former one".

Counsel for appellant further state that the contempt of which appellant was found guilty was a civil contempt, for the benefit of the plaintiff; that defendant did not embarass, hinder or obstruct the court in the administration of justice or lessen its authority or dignity; that the proceeding was strictly civil, not criminal and defendant had the right to purge himself by paying the amount due at the time the rule to show cause was entered.

In our former opinion this court said: "At the hearing on the rule to show cause on September 6, 1957, the defendant admitted that he had not made any payments directly to his wife, as required by the court in its order of June 25. At the conclusion of that hearing the court stated that he thought the order of June 25 should be enforced and that the defendant should decide whether he was going to comply. A recess in order that

On December 22, 1952 Mr. Jones filed his petition praying for an order vacating the order entered on [illegible], 1952 and on December 17, 1952 and that he be discharged from said contempt [illegible]. Upon a hearing the prayer of this petition was [illegible] and [illegible] record to this court for review.

Counsel for appellant [illegible] that the [illegible] was erroneous because it made no [illegible] purge himself of the contempt. [illegible] former appeal this court [illegible] direct contempt or an indirect contempt [illegible] the contempt was civil or criminal or [illegible] purge himself from the contempt of [illegible] state that all this court held was [illegible] chancellor was mulcting [illegible] insists that "the issues are [illegible] former case".

Counsel for appellee [illegible] which appellant was found guilty [illegible] the plaintiff; that defendant did not [illegible] court in the administration of justice [illegible] dignity; that the proceeding was [illegible] had the right to purge himself by [illegible] rule to show cause was entered.

In our former opinion this court [illegible] rule to show cause on September [illegible], 1952, the defendant [illegible] had not made any payments directly to his wife, [illegible] the order of June 25. At the conclusion of that [illegible] that he thought the order of June 25 should be enforced and that the defendant should decide whether he was going to comply. [illegible] reason in order that

counsel might confer was had and after the recess, counsel for the plaintiff stated that nothing had come out of their talk. The court then stated that he did not like to send people to jail, even for the violation of a court order and would not do so if he had any assurance from the defendant that he would purge himself within a reasonable time, and he asked the defendant's counsel if he had anything to offer to the court. Whereupon defendant's counsel answered, 'No'. The court then stated: 'It is the judgment of the court that the defendant be sentenced to the county jail of McHenry County for sixty days as punishment for his wilful and contumacious contempt of this court'. The formal written contempt order, followed this judgment and in our opinion it meets the requirement that an order finding a person in contempt of court be certain and definite. There can be no mistake as to how long the defendant is to remain in jail, as the time is fixed at sixty days". (Kovac vs. Kovac, 17 Ill. App. 2d 492).

In veiw of our holding in Kovac vs. Kovac, 17 Ill. App. 2d 492, 150 N.E. 2d 664 the contempt order of September 7, 1957 is res adjudicata. We held it definite and certain. It was a punitive order intended to punish defendant for his flagrant and wilful disobedience of a valid order entered by the court. It was not intended as a means to coerce payment of the amount due the plaintiff under a prior order entered by the court. Had it been it would have provided for the release of defendant upon compliance with that order.

Appellant complained on the first appeal and now insists that the order adjudging him in contempt did not give him the choice of paying to his wife what he had been ordered to pay her or going to jail for non-compliance. Under the facts disclosed by this record, appellant invited the order which the trial court indicated he preferred not to enter.

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then stated that he [illegible]
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and he cited the [illegible]
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Appellant [illegible]
order adjudging him in contempt [illegible]
his wife [illegible]
compliance. Under the facts [illegible]
the order which the trial court [illegible]

There is no merit in this appeal. Furthermore this is a second attempt upon the part of appellant, to procure a review of the same order which we previously have considered and affirmed. The motion of appellee to dismiss the appeal, which we took with the case, will be sustained and this appeal will be dismissed. (J.H. Walters & Co. vs. Canham Sheet Metal Corp. 8 Ill. App. 2d 121, 127).

Appeal dismissed.

Mc NEAL, J. CONCURS.

SMITH, J. CONCURS.

There is no merit in this appeal. Furthermore this is a second attempt upon the part of appellant, to procure a review of the same order which we previously have considered on different [illegible]. The order of appellee to dismiss the appeal, which we [illegible] the [illegible], will be sustained and this appeal will be dismissed. [illegible] v. Cochran Wheat Motel Corp., 6 Ill. App. 2d 171, [illegible].

[illegible]

Mc GEE, J. CONCURS.

SMITH, J. CONCURS.

48409

CITY OF CHICAGO, a Municipal corporation,	)	APPEAL FROM THE
Appellee,	)	
	)	MUNICIPAL COURT
v.	)	
EDGAR CRILLY,	)	OF CHICAGO.
Appellant.	)	

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an action by the City of Chicago to recover a penalty for an alleged violation of the City's Smoke Abatement Ordinance. The defendant, Edgar Crilly, now deceased, pleaded guilty, and the court imposed a fine of $200 and costs. Defendant appealed, and his executor has been substituted in these proceedings.

The Air Pollution Control Ordinance (Ch. 17 of the Municipal Code of Chicago, §17-79) provides that "Any person found guilty of violating * * * any of the provisions of this chapter * * * upon conviction thereof shall be punished by a fine of not less than ten dollars nor more than two hundred dollars for the first offense."

The quasi-criminal complaint charged that "Defendant did on August 30th, 1960, unlawfully permit the north brick incinerator stack of above premises [1701 North Park Avenue] to emit #3 dense smoke in the hour following 10:28 A.M., for a period of seven (7) minutes, in violation of Section 17-23 and 17-27 of the Municipal Code of Chicago."

The sole question for our determination is whether, as defendant contends, the court abused its discretion in fixing the fine at the maximum amount which could be allowed for the first offense.

Defendant, an elderly man, did not appear at the trial. He was represented by an attorney, who offered defendant's plea of guilty after the attorney for the City made a short statement of the charge. The court then proceeded to hear evidence as to aggravation and mitigation.

In mitigation, defendant's attorney stated to the court: "We have replaced the screens over this incinerator, which was breaking the draft, and we have had an incinerator company in there to fix it all up and were notified that everything was all right, and I have been told that if we comply, that the case will be dismissed and now I hear this morning that there are still complaints--I didn't know that before, and we want to comply with whatever you want." The court then directed that the plea be withdrawn and requested information as to what had to be done. An inspector for the City stated that it was an incinerator twenty-five years old, in which garbage for about ten buildings was being burned. In response to an inquiry by the court: "Why don't you file new complaints as these things come up? I have only one complaint before me and this is a violation of the law for every day," the attorney for the City stated: "We would like to dismiss

and do just exactly that, your Honor." After some further discussion, the attorney for defendant stated: "I am going to plead guilty on this one charge--smoke for 7 minutes." The court then heard evidence in aggravation offered by the City.

The City inspector stated that when he was at the building on October 17, 1960, he found another violation. An owner of a shop across the alley from the incinerator stack in question stated to the court that he had been complaining since June, 1958, of "the odor from this stack and particularly the fly ash, the nature of dropping of fly ash during the burning of trash and garbage in the morning." He made his complaints to the City and had informally discussed the matter with two persons from defendant's office, the last discussion being "within the last two weeks."

In passing sentence after a plea of guilty, the trial court is invested with complete judicial discretion within the limits of the punishment fixed by law. The hearing of evidence in aggravation and mitigation is to assist the trial judge in the exercise of that wide judicial discretion which has been placed in his care. If the defendant has not been materially prejudiced by the procedure which the court adopts in conducting the inquiry, the reviewing court will not interfere with the penalty imposed.

In the hearing of evidence as to aggravation and mitigation, the court is not bound by "the rules of evidence which ordinarily obtain in a trial where guilt is denied * * *. It may look into the facts of the offense, and it may search anywhere, within reasonable bounds, for other facts which tend to aggravate or mitigate the offense." People v. Grabowski (1957), 12 Ill.2d, 462, 466.

Defendant argues that the witnesses were not sworn and that it was improper for the court to consider the statements made by the inspector and the shop owner. The City contends the witnesses were sworn as a group at the beginning of the hearing, but it does not affirmatively appear from the record that any witnesses were sworn. However, defendant made no such objection during the trial, and the trial court was not called upon to make any ruling in this regard. The only objection made by defendant, to the testimony in aggravation, was that it was not "pertinent." The objection that the witnesses were not sworn comes too late on this appeal. Village of Northbrook v. Steerup (1959), 16 Ill.2d 530, 534; Graham v. Dressen (1937), 292 Ill. App. 15, 22.

Defendant also contends that the trial court improperly considered violations at another location known as 1719 North Park Avenue. We do not believe the record supports this contention. The shop owner identified the incinerator stack in question, the subject of the guilty plea, as the location of the other violations offered in aggravation.

In any event, where a case is heard by the trial court without a jury, it will be presumed by the reviewing court, in the absence of a showing to the contrary, that the trial court considered only such evidence as was competent and proper. (People v. Grabowski, 12 Ill.2d 462, 467; 2 I.L.P., Appeal and Error, §734.) This rule applies here. We conclude the evidence offered by the City in aggravation in this case was "pertinent" and was properly considered by the trial court in determining the penalty.

Strict enforcement of the Smoke Abatement Ordinance is very important in Chicago. While the maximum penalty here imposed for the first offense may seem severe, the record indicates that the trial judge was presented with an aggravated situation, calling for a greater deterrent than the minimum penalty for the first violation. Apparently, defendant or his office employees had been informed on a number of occasions, over a long period of time, that the use of the incinerator resulted in daily violations of the Air Pollution Ordinance. The remarks made by the trial judge indicate that he felt that a maximum fine, asked for by the City, might act as a deterrent to future violations and an impetus to defendant to cause effective repairs to the incinerator.

Upon this record, we cannot say that the court abused the "wide judicial discretion" which the law has expressly committed to him for the accomplishment of the purposes of the Air Pollution Ordinance. Therefore, the judgment of the trial court is affirmed.

AFFIRMED.

BURMAN AND ENGLISH, JJ., CONCUR.
ABSTRACT ONLY.

The sole question for our determination is whether, as defendant contends, the court abused its discretion in fixing the fine at the maximum amount which could be allowed for the first offense.

Defendant, an elderly man, did not appear at the trial. He was represented by an attorney, who offered defendant's plea of guilty after the attorney for the City made a short statement of the charge. The court then proceeded to hear evidence as to aggravation and mitigation, as required under the provisions of the Criminal Code (Ill. Rev. Stat. 1959, Ch. 38, §732).

In mitigation, defendant's attorney stated to the court: "We have replaced the screens over this incinerator, which was breaking the draft, and we have had an incinerator company in there to fix it all up and were notified that everything was all right, and I have been told that if we comply, that the case will be dismissed and now I hear this morning that there are still complaints--I didn't know that before, and we want to comply with whatever you want." The court then directed that the plea be withdrawn and requested information as to what had to be done. An inspector for the City stated that it was an incinerator twenty-five years old, in which garbage for about ten buildings was being burned. In response to an inquiry by the court: "Why don't you file new complaints as these things come up? I have only one complaint before me and this is a violation of the law for every day," the attorney for the City stated: "We would like to dismiss

and do just exactly that, your Honor." After some further discussion, the attorney for defendant stated: "I am going to plead guilty on this one charge--smoke for 7 minutes." The court then heard evidence in aggravation offered by the City.

The City inspector stated that when he was at the building on October 17, 1960, he found another violation. An owner of a shop across the alley from the incinerator stack in question stated to the court that he had been complaining since June, 1958, of "the odor from this stack and particularly the fly ash, the nature of dropping of fly ash during the burning of trash and garbage in the morning." He made his complaints to the City and had informally discussed the matter with two persons from defendant's office, the last discussion being "within the last two weeks."

In passing sentence after a plea of guilty, the trial court is invested with complete judicial discretion within the limits of the punishment fixed by law. The hearing of evidence in aggravation and mitigation is to assist the trial judge in the exercise of "that wide judicial discretion which has been placed in his care." If the defendant has not been materially prejudiced by the procedure which the court adopts in conducting the inquiry required by the Criminal Code, the reviewing court will not interfere with the sentence pronounced. People v. Riley (1941), 376 Ill. 364, 369.

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